MUNICIPAL BOARD DECISIONS

VOLUME EIGHT-B/1989
PART I

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON

* * * *

DOREEN A. FRIIS – Clerk

CLYDE A. PAUL, LL.B. – Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARIES AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1989 TO DECEMBER 31, 1989.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

90-07038/

PLANNING

CASE TABLE

Amherst (Town) & Coates Dairy Bar, Chisholm v. 9

Argand & Halifax (City), Brown v. 1

Atlantic Nurseries Ltd. & Halifax (County), Grady v. 126

Barnes v. Sydney Mines (Town) 83

Barrie v. Provincial Director of Planning 543

Barrington (District), Victoria Hotel/Motel (1986) Ltd. v. ...369

Bates/Schuhlein v. New Glasgow (Town) 194

Bedford (Town), Walsh v. 331

Bedford (Town) & Bedford Village Properties, Hattin v. 248

Bedford (Town) & Oakmount Residents Association, Redden Brothers v. 304

Bedford Village Properties & Bedford (Town), Hattin v. 248

Blom/Ferguson v. Halifax (City) 113

Brown v. Halifax (City) & Argand 1

Cape Breton (County) & MacLeod, Long/MacMillan v. 580

Chester (District), Schnare v. 441

Coates Dairy Bar & Amherst (Town), Chisholm v. 9

Colchester (County) & Saywood Development Ltd., Frizzel v. ... 29

Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Fairlanes & Kings (County), Swanburg v. 345

Ferguson/Blom v. Halifax (City) 113

Frizzel v. Colchester (County) & Saywood Development Ltd. 29

Goshen v. Halifax (City) 294

Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

Group Marketing Co-Ordinates & Yarmouth (Town), Murphy Car Sales v. 356

Halifax (City), Blom/Ferguson v. 113

Halifax (City), Goshen v. 294

Halifax (City), L & G Holdings Ltd. v. 278

Halifax (City), Rajendram v. 365

Halifax (City) & Argand, Brown v. 1

Halifax (County) & Atlantic Nurseries Ltd., Grady v. 126

Hattin v. Bedford (Town) & Bedford Village Properties 248

Kings (County), Reid v. 19

Kings (County) & Fairlanes Ltd., Swanburg v. 345

Kingston Aluminum Products Ltd. v. Truro (Town) 267

Knickle v. Lunenburg (Town) & Sweeney 102

L & G Holdings Ltd. v. Halifax (City) 278

Long/MacMillan v. Cape Breton (County) & MacLeod 580

Lunenburg (Town) & Sweeney, Knickle v. 102

MacLeod & Cape Breton (County), Long/MacMillan v. 580

New Glasgow (Town), Bates/Schuhlein v. 194

Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

Oakmount Residents Association & Bedford (Town), Redden Brothers v. 304

Provincial Director of Planning, Barrie v. 543

Rajendram v. Halifax (City) 365

Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Reid v. Kings (County) 19

Saywood Development Ltd. & Colchester (County), Frizzel v. ... 29

Schuhlein/Bates v. New Glasgow (Town) 194

Schnare v. Chester (District) 441

Swanburg v. Kings (County) & Fairlanes Ltd. 345

Sweeney & Lunenburg (Town), Knickle v. 102

Sydney Mines (Town), Barnes v. 83

Trask v. Yarmouth (District) 156

Truro (Town), Kingston Aluminum Products Ltd. v. 267

Vaughne Realty Ltd. Ltee. v. Yarmouth (Town) 471

Victoria Hotel/Motel (1986) Ltd. v. Barrington (District) 369

Walsh v. Bedford (Town) 331

Yarmouth (District), Trask v. 156

Yarmouth (Town), Vaughne Realty Ltd. Ltee. v. 471

Yarmouth (Town) & Group Marketing Co-Ordinates, Murphy Car Sales v. 356

PLANNING

STATUTE TABLE

PLANNING ACT, S.N.S. 1983, c. 9

s. 61B(3)
Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

s. 63(4)(e)
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

s. 63(7)
Reid v. Kings (County) 19
Trask v. Yarmouth (District) 156

s. 71, 72
Rajendram v. Halifax (City) 365

s. 74(2)
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

s. 7, 24(1)
Knickle v. Lunenburg (Town) & Sweeney 102

PLANNING

SUBJECT TABLE

Buffering - Development Agreement - approval to permit apartment buildings and townhouses - shadowing - quality of life
Hattin v. Bedford (Town) & Bedford Village Properties 248

Buffering - Development Agreement - refusal to enter into a permit for two 28-family units
Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Development Agreement - Council approval to permit 59 unit apartment building
Brown v. Halifax (City) & Argand 1

Development Agreement - Non-conforming use - convenience store
Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Development Agreement - Approval to permit apartment buildings and townhouses - shadowing - buffering - quality of life
Hattin v. Bedford (Town) & Bedford Village Properties 248

Development Agreement - Approval to permit 22-unit condo-pollution - architectural compatibility - Charter of Rights
Knickle v. Lunenburg (Town) & Sweeney 102

Development Agreement - Refusal to amend - jurisdiction of the Board
Rajendram v. Halifax (City) 365

Development Agreement - Refusal to enter into a permit for two 28-family units - buffering
Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Development Agreement - Salvage yard - refusal - street frontage
Schnare v. Chester (District) 441

Downzoning - L.U.B. Amendment - Downzoning block from C-3 to R-2
Blom/Ferguson v. Halifax (City) 113

Non-Conforming Use - Subdivision - Refusal to approve - Board's jurisdiction
Walsh v. Bedford (Town) 331

Land Use By-law Amendment - Refusal to amend L.U.B. from R-1 to C-2 - convenience store
Barnes v. Sydney Mines (Town) 83

Land Use By-law Amendment - Refusal to rezone R-2 to R-3 to permit 24 condominium townhouses - Board decisions
Bates/Schuhlein v. New Glasgow (Town) 194

Land Use By-law Amendment - Downzoning block from C-3 to R-2
Blom/Ferguson v. Halifax (City) 113

Land Use By-law Amendment - R-1 to C-2 to permit convenience store - no specific proposal
Frizzel v. Colchester (County) & Saywood Development Ltd. 29

Land Use By-law Amendment - Refusal to rezone R-2P to R-2AM to permit 14-unit apartment building
Goshen v. Halifax (City) 294

Land Use By-law Amendment - Refusal to rezone R-2 to C-2 - no specific proposal - undue hardship
Kingston Aluminum Products v. Truro (Town) 267

Land Use By-law Amendment - Refusal to rezone R-2P to R-2AM to permit 14-unit apartment building
L & G Holdings Ltd. v. Halifax (City) 278

Land Use By-law Amendment - Rezoning from R-1 to C-2 to permit service station
Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

Land Use By-law Amendment - Refusal to rezone 01 to C1 - undue hardship - extraordinary and compelling circumstances
Reid v. Kings (County) 19

Land Use By-law Amendment - Rezoning from R-1 to C-1 to permit parking lot for bowling alley - buffering
Swanburg v. Kings (County) & Fairlanes Ltd. 345

Land Use By-law Amendment - Refusal to rezone G-D to G-C to permit motorcycle campground - undue hardship - extraordinary and compelling circumstances
Trask v. Yarmouth (District) 156

Land Use By-law Amendment - Refusal - lounge - accessory use to Hotel/Motel
Victoria Hotel/Motel (1986) Ltd. 369

Land Use By-law Amendment - Refusal to rezone R-1 to R-2 to permit 4-unit townhouse - minor variance
Vaughne Realty Ltd. Ltee. v. Yarmouth (Town) 471

Non-conforming Use - Development Agreement - convenience store
Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Non-conforming Use - Subdivision - Refusal to approve - Board's jurisdiction
Walsh v. Bedford (Town) 331

Regional Development Permit - particular locational need or advantage - oyster hatchery - person aggrieved - expert witnesses
Barrie v. Provincial Director of Planning 543

Rezoning - R-1 to C-1 best interests - Garden Centre-environmental concerns
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

Rezoning - Best interests of the Municipality - R-1 and A-2 to C-1 and C-2 to permit motel and campground
Long/MacMillan v. Cape Breton (County) & MacLeod 580

Subdivision - Refusal to approve - Board's jurisdiction - non-conforming use
Walsh v. Bedford (Town) 331

Undue Hardship - Land Use By-law amendment - Refusal to rezone R-2 to C-2 - no specific proposal
Kingston Aluminum Products v. Truro (Town) 267

Undue Hardship - Land Use By-law amendment - Refusal to rezone 01 to C1 - extraordinary and compelling circumstances
Reid v. Kings (County) 19

SHOPPING CENTRE DEVELOPMENT ACT, S.N.S. 1978-1979, c. 74

Shopping Centres - Expansion of existing mall - Shopping Centre Development Act, s. 6
Application by Markborough Properties Ltd. and Burnac Leaseholds 609

MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S.N.S. 1982, c. 10

Mutual Boundary - Settlement by agreement - Municipal Boundaries and Representation Act - s. 25
County of Pictou and Town of Trenton 617

BROWN v. CITY OF HALIFAX and ROSE ARGAND

PLANNING - DEVELOPMENT AGREEMENT - COUNCIL APPROVAL TO PERMIT 59-UNIT APARTMENT BUILDING - HALIFAX CITY M.P.S. POLICIES 2.1.1; 2.2.

Applicant earlier applied to build 116 unit building and Board overturned Council's approval. A 23-unit building constructed as-of-right. Now seeking to add 59 unit building and parking structure. E.B. appealed since her home will be surrounded by the buildings. Proposal is deficient in parking spaces under L.U.B. but Council may permit under development agreement. Existing houses run down. Under the proposed PNSPS building could develop as-of-right.

HELD: Appeal dismissed.

The building is neither as massive nor as high as the earlier proposal. The present neighbourhood pattern includes high rise, low rise and co-op units. The proposed building falls into a middle range. In determining the needs of the neighbourhood it is appropriate to consider the proposed secondary planning strategy. The proposal does not constitute infill.

NSMB-13-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, as amended, by **ETHEL M. BROWN** from a decision of the Council of the City of Halifax made April 21, 1988, which decision approved a development agreement for Charles Place, Phase II, to permit the construction of a 59-unit apartment building and parking structure at Civic Numbers 2502-18 Gottingen Street together with an existing 23-unit apartment building at 2535 Creighton Street on the application of **ROSE ARGAND**.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ANTHONY ROSS, LL.B., and JOHN WOOD, LL.B., for the Appellant;

WALTER THOMPSON, LL.B., and MICHAEL ARGAND, LL.B., for the Applicant;

WAYNE ANSTEY, Q.C., for the City of Halifax.

HEARING DATES: August 30, 1988; October 13, 1988 and December 15, 1988.

DECISION DATE: January 24, 1989.

DECISION: **Appeal dismissed.**

DECISION

Mrs. Ethel M. Brown, the Appellant, has resided for many years at 5521 Charles Street, between Creighton and

Gottingen Streets. Mrs. Rose Argand, the Respondent, and her late husband, over the years, acquired the houses adjacent to the Brown residence on Gottingen and Creighton Streets.

In 1982 Halifax City Council approved the construction of a 116-unit apartment building on the Argand properties. Mrs. Brown and others appealed Council's decision. In Brown et al v. City of Halifax (1986), 5-B M.B.D. 149, the Municipal Board allowed the appeal. It held the proposed high rise development was not compatible with the neighbourhood being "too massive in scale" and "too high".

Later the Argands built an as-of-right 3-storey, 23-unit apartment building on the portion of this land fronting on Creighton Street. Mrs. Argand has now proposed and received Council approval for a development agreement to construct a 7-storey 59-unit apartment building on the balance of the land. The proposal includes a parking structure with 3 levels, one level accessed from Gottingen Street, one from Charles Street and the surface level from Creighton Street.

Since the proposed building exceeds 50 feet in height and 25 building units, a development agreement is required. The agreement covers both the proposed building and the existing 23-unit building.

While considering the proposal, Council was also considering the adoption of the Peninsula North Secondary Planning Strategy ("PNSPS"). Council later adopted the PNSPS but it did not receive Ministerial approval. [The Board hearing was adjourned pending a Court review of the Minister's refusal. The City was unsuccessful in overturning the Minister's decision].

In making its decision, Council looked at both the existing Land Use By-law and the one proposed under the PNSPS. As the following chart shows the proposed development is deficient in the number of parking spaces required under the existing by-law but exceeds the requirements of the PNSPS. It is also deficient in landscaped open space although it exceeds the other open space:

	EXISTING BYLAW	PNSPS	AS PROPOSED
Parking	82	51	72
Landscaped Open Space	18,680 sq.ft.	18,680 sq.ft.	15,199 sq.ft.
Other Open Space	3,440 sq.ft	3,440 sq.ft	5,100 sq.ft.

Council decided the developer must meet the open space requirements and reduced the number of parking spaces. While there is still a deficiency in the number of parking spaces, Council may permit such deficiencies under a development agreement.

In her Notice of Appeal, Mrs. Brown has raised the following grounds of Appeal (as summarized by the Board):

1. THAT the Appellant was not given a fair opportunity to oppose the application...;
2. THAT the proposed agreement will adversely affect the value and reasonable enjoyment of the Appellant's

property;

3. THAT the Planning Development is in direct conflict with Policies 1.1, 1.11 and 1.2 of the Peninsula.

The parties agreed the substance of the Appellant's argument is contained in Ground 3. The Board notes that the Appellant did not testify.

The relevant policies of the Municipal Planning Strategy ("M.P.S.") are as follows: (The M.P.S. has been amended, the current policy numbers are in brackets).

> "Policy 1.1 (now 2.1)
>
> Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services.
>
> Policy 1.1.1 (now 2.1.1)
>
> On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighborhoods; and the City shall develop the means to do this through the detailed area planning process.
>
> Policy 1.2 (now 2.2)
>
> The integrity of existing residential neighborhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2, as appropriate."

The proposed development satisfies Policy 1.1

Respecting Policy 1.1.1, the evidence is the existing buildings are run down and cannot be retained or rehabilitated.

It was suggested the proposed development was infill, but this is an interpretation that the Board does not accept. Mr. Anstey, Counsel for the City, argued that Policy 1.1.1 is a discretionary not mandatory policy. Mr. Ross, on behalf of the Appellant, argued that the developer had allowed the buildings to deteriorate so Council would permit the development because anything was better than what was there. While there is merit in Mr. Ross' argument, the Board agrees that the policy is discretionary. The evidence is that the buildings cannot be renovated. Council's decision is not in conflict with this policy.

Policy 1.2 applies in this case. Terrance Brown, son of the Appellant, described the neighbourhood when he was growing up. The area has changed since then with a good deal of redevelopment. The Appellant's solicitor stressed that aside from the high rise senior citizen complexes, built fifteen years ago, much of the redevelopment has been in low-rise buildings or co-ops.

The Board notes that immediately adjacent to the development on Gottingen Street is a 24-unit building. The existing as-of-right building on Creighton Street is 23 units.

The proposed building will be 68 feet high on the Gottingen Street side and 55 feet high in the rear adjacent to the Brown property. The earlier proposal called for 9 stories on Gottingen Street while this development will be 7 stories. The building will impact on Mrs. Brown's property.

Policy 1.2 requires a consideration of both the present neighbourhood development pattern and the needs of the neighbourhood. In determining the needs of the neighbourhood, it is appropriate to consider the PNSPS. While the Minister of Municipal Affairs refused to approve it, his reasons do not affect the policies applying to this development. The evidence is that under the PNSPS the proposed development could proceed. This gives some indication of the needs of the neighbourhood.

The building is neither as massive nor as high as the earlier proposal. On the other hand it is larger than the adjacent buildings. The present neighbourhood pattern includes high rise senior citizen complexes, low rise apartment buildings and co-op units. The proposed building falls into a middle range. It is not as high as the existing high rises but it is higher than the adjacent buildings. The proposed building will have an impact on the Brown residence. Under the PNSPS the building could be developed as-of-right.

On an appeal under Section 71 of the Planning Act, the Board's powers are restricted. It cannot interfere with Council's decision unless the decision cannot reasonably be said to be consistent with the intent of the M.P.S. The Board cannot substitute its own decision but must determine whether Council's decision is reasonably consistent with the intent of the M.P.S.

One matter does concern the Board. In the Staff Report to Council, there is no specific mention of Mrs. Brown's residence, although it is shown on the sketches which accompanied the Report. Given the location of this property, it appears to the Board that reference to it should have been made in the Report. It is clear from the Minutes of the Public Hearing that this matter was drawn to Council's attention both by the developer and by Mr. Ross. Mr. Ross also raised several other issues at the public hearing. [The Report did draw Council's attention to the earlier proposal and the Board's decision].

While the Board might well not have allowed the development, it cannot say that Council has erred. The Board is satisfied that Council's decision is reasonably consistent with the intent of the M.P.S. The Appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of January, A.D., 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

CHISHOLM v. TOWN OF AMHERST AND COATES DAIRY BAR

PLANNING - DEVELOPMENT AGREEMENT - NON-CONFORMING USE-CONVENIENCE STORE - AMHERST M.P.S., S. 1.5, POLICY 7.6.2A.

Council approved a development agreement permitting a convenience store to open in the rear of a seasonal Dairy Bar, an existing non-conforming use. The M.P.S. was amended to permit changes to non-conforming uses provided the proposal will exert less or the same negative impact on surrounding properties. Council felt the convenience store was a benefit to area despite negative impact. C.C. a nearby resident appealed.

HELD: Appeal Allowed.

The overall policy in M.P.S. is not to permit convenience stores in residential areas. The conversion of non-conforming uses is a sensitive matter. Policy 7.6.2A requires an analysis of the negative impacts of the proposal. It does not permit a balancing of benefits against negative impacts. A year-round convenience store will have a greater negative impact on the surrounding properties in terms of traffic generation, noise, fumes and litter than a seasonal dairy bar.

NSMB-24-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An appeal under the Planning Act, S.N.S., 1983, c. 9, as amended, by **CORRENE CHISHOLM** from a decision of the Council of the Town of Amherst made on September 19, 1988, to enter into a development agreement for a proposed convenience store on land occupied by **COATES DAIRY BAR** on Willow Street.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DAVID GRUCHY, Q.C., and GARY RICHARD, Articled Clerk, for the Appellant;

PETER McLELLAN, LL.B., for the Applicant, Rod Wood;

BRIAN CREIGHTON, LL.B., for the Town of Amherst.

HEARING DATE: January 12, 1989.

BRIEFS SUBMITTED: January 25th and 26th, 1989, February 6, 1989.

DECISION DATE: February 15, 1989.

DECISION: **Appeal Allowed.**

DECISION

The Coates Dairy Bar opened in 1961 on Willow Street in Amherst. It is open between May and October each year. The

Dairy Bar sells ice cream products, milk, pop and cigarettes.

The Dairy Bar is adjacent to the Coates Farm. Across the street are homes built after the Dairy Bar opened. There is a good deal of vacant land in the area which the Town has designated for residential use. A new Junior High School will open in September, 1989, across the street from the Dairy Bar.

In the fall of 1987, Rod Wood began discussions to purchase the Dairy Bar property. Mr. Woods wants to open a convenience store in the rear of the building housing the Dairy Bar. He intends to continue operating the Dairy Bar on a seasonal basis and, in fact, ran it this past summer.

All the witnesses said the Dairy Bar is well-kept. There was no difference under the new management. The Appellant, **CORRENE CHISHOLM**, lives on Willow Street opposite the Dairy Bar. She is opposed to a year-round convenience store on the property.

The Dairy Bar property is a legal non-conforming use in a residential area. Before August 1987, a non-conforming use could not be changed to a different non-conforming use. The Planning Act was amended in August, 1987, to allow amendments to a Municipal Planning Strategy ("M.P.S.") to permit changing a non-conforming use.

The Town's Planning Advisory Committee ("P.A.C.") in July, 1987, asked Staff to prepare a report on possible amendments to the M.P.S. to permit changes of non-conforming uses. P.A.C. received the report, dated August 19, 1988, in

November. A number of P.A.C. and Council meetings and public hearings followed.

With the agreement of all parties, a booklet containing the Minutes of P.A.C. and Council meetings dealing with the amendments to the M.P.S. was made an Exhibit. The Minutes show that both P.A.C. and Council gave careful consideration to the wording of the amendment.

Much of the discussion of P.A.C. and Council concerned the possibility of a convenience store at the Dairy Bar location. Citizens both for and against the proposal for the convenience store on the subject property made presentations.

Council passed the amendments on April 18, 1988. The Minister of Municipal Affairs approved them on June 27, 1988. There were two specific amendments to the M.P.S.

Only one of the amendments applies to this appeal and is as follows:

> "Changes to the Planning Act in 1987 broadened Council's powers with respect to non-conforming uses. More specifically, it is now possible to develop policies to allow non-conforming uses to change into a different use which would not be otherwise permissible. The development agreement procedure is the best means by which to allow such changes, Council having the power through the agreement to control negative impacts associated with such changes.
>
> Policy 7.6.2A
>
> It shall be the intention of Council to consider proposals to convert any non-conforming use or uses within the "predominantly Residential" designation into another use or uses not normally permitted. If Council is satisfied that the proposal:
>
> (i) will exert less or the same negative impact on surrounding conforming properties in terms of impacts due to factors relevant to consideration of a

> development agreement as indicated in Policy 7.3.1, such as noise, traffic generation, fumes, glare, dust, smoke, or visual or architectural appearance, and the like; and
>
> (ii) includes adequate provisions for parking for patrons of the new use or uses and for buffering, landscaping or fencing as may be required to minimize conflict with adjacent properties; and
>
> (iii)will not involve any expansion of the use onto a lot of land not originally occupied by the use except for the purpose of providing parking;
>
> Council may enter into a development agreement as outlined in Policy 7.3.1 with the property owner to allow such development to take place. The agreement shall include terms which address the matters contained in Clauses (i), (ii), and (iii) of this policy are considered. When comparing the proposed development to the existing use or uses, the basis for comparison shall be to compare the anticipated nature of the new development to the typical nature of the existing use or uses, as it or they actually existed during the one year period leading up to the time of application for the development agreement, but excluding any impacts arising from illegal development or use of the land in question."

The Board considers Policy 7.6.2A a fair compromise. While allowing the owner of a non-conforming use some leeway, it protects the surrounding area by restricting any change to a use which exerts less or the same negative impact.

The Policy is very specific about the factors which Council must consider in assessing the negative impact.

Jens Jensen, Executive Director of the Cumberland District Planning Commission prepared an extensive report (29 pages plus attachments) for P.A.C. and Council. He reviewed all the relevant policies and concluded that the proposal was not within the intent of the M.P.S.

The report included a section entitled "Best Case"

Development Agreement. In this Section, Mr. Jensen considered possible alterations to remedy the deficiencies in the proposal. The Board is impressed with this procedure which allows Council to see the proposal in its best possible light. While Mr. Jensen was able to suggest improvements, his final recommendation remained the same - that Council should refuse the application. Council included most of Mr. Jensen's improvements in the version of the development agreement which they approved.

Both P.A.C. and Council chose to emphasize positive factors about the proposal. The members felt that a convenience store in that location would be a benefit to the existing residents and to the future residential development. While they may be correct in that assessment, it is not one of the factors which Policy 7.6.2A directs them to consider.

Policy 7.6.2A has three clauses. Dealing with them in reverse order, the proposal does not offend clause (iii). It does not involve any expansion of the use onto a lot of land not originally occupied by the use.

With respect to clause (ii), the requirements for parking have been met. Buffering has been met in part although Mr. Jensen feels the front of the building will not be adequately buffered.

With respect to clause (i) of Policy 7.6.2A, consideration must be given to the wording which immediately follows the Policy. The method for comparing the proposed use with the existing use is spelled out. The anticipated nature of the new development is to be compared to the typical nature of the existing use as it existed during the one-year period leading up to the time of the application for the development agreement.

In making this comparison, it becomes obvious that this is an unusual case because the Dairy Bar is a seasonal operation while the convenience store is to operate year round.

For purposes of his report, Mr. Jensen conducted a traffic count at the Dairy Bar and at another convenience store. He then extrapolated figures to show the anticipated traffic for the new use.

In determining the intent of any Policy in the M.P.S. it is necessary to consider the whole of the M.P.S. Policy Section 1.5 of the M.P.S. entitled Commercial Development in Residential Areas must be considered. The overall policy is not to permit convenience stores in areas designated predominately residential. The following commentary on page 23 of the M.P.S. is particularly relevant:

> "In addition, convenience stores in residential areas often cause problems associated with litter, noise and traffic."

A previous Council decision to refuse a rezoning to permit a convenience store in the Predominately Residential Designation was upheld by the Board in Black v. Amherst (1986), 5-B, M.B.D. 279.

Both Peter McLellan, on behalf of Mr. Wood, and Brian Creighton, for the Town, argue that the residents do not consider that the existing Dairy Bar has a negative impact. The intent of Section 1.5 of the M.P.S. is clearly that convenience stores do have a negative impact on residential neighbourhoods.

Council was very careful in adopting the wording for Policy P-7.6.2A. The conversion of non-conforming uses is a sensitive matter and the Policy adopted recognizes that fact. The difficulty in this case is that Council emphasized a factor which the Policy did not address and which another section of the M.P.S. contradicts. Council took the position that a convenience store would be a benefit to the residents.

Policy 7.6.2A requires an analysis of the negative impacts. It does not permit a balancing of benefits against negative impacts. Clause (i) is very specific as to the factors to be considered. The developer has agreed to certain changes which would reduce some of the negative impact. A year round convenience store and a seasonal dairy bar, however, will have a greater negative impact on the surrounding conforming properties in terms of traffic generation, noise, fumes and litter than a seasonal dairy bar alone.

The position of both the Town and the developer is that the existing use does not have a negative impact on the surrounding neighbourhood. With the addition of a convenience store there will be an increase in traffic generation in and out of the property year round (if not, Mr. Wood's store would fail), which will result in an increase in fumes and noise. Traffic generation, fumes and noise levels are considered negative impacts in planning matters. In addition Policy 7.6.2A has specifically identified them as such. The subject property is located near the site of the new junior high school which will undoubtedly increase pedestrian traffic and is likely to increase litter.

Mrs. Chisholm is concerned that students will run through her backyard to get to the store. From a review of an area plan, the Board thinks it is quite likely that unless fences are erected, students may trespass on the properties which adjoin the schoolyard and are opposite the subject property. Mrs. Chisholm's property, however, appears to be far enough east of the school not to be affected.

Mr. McLellan argues that Council chose the words in Policy 7.6.2A knowing that Mr. Wood's application would be the first one. He suggests that Council intended that Mr. Wood's application would meet the criteria. Whether or not that was Council's intention, the Board must consider the words of the Policy as they are written and in the context of the overall M.P.S.

In the Board's opinion the proposal will exert a greater negative impact on the surrounding conforming properties than the existing Dairy Bar. Council's decision cannot reasonably be said to be consistent with the intent of the M.P.S.

The Board wishes to raise one additional matter. Policy 7.6.2A provides for the conversion of any non-conforming use. In this case Council approved an additional non-conforming use. The Board questions whether Policy 7.6.2A permits adding a non-conforming use to an existing use.

The Board allows the appeal and reverses the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

REID v. **KINGS COUNTY**

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE 01 TO C1 - UNDUE HARDSHIP - EXTRAORDINARY AND COMPELLING CIRCUMSTANCES - PLANNING ACT, S. 63(7).

R. & W.R. applied to rezone their land in New Minas from Environmental Open Space to C1 to permit an existing car and truck repair business following a court action. The business had gradually developed. The Appellants have no other source of income.

HELD: Appeal allowed and land rezoned C1.

Council's decision reasonably carried out the intent of M.P.S. However, Section 63(7) applied. This is an extraordinary power. The legislature must have intended that L.U.B. could be amended despite being inconsistent with the intent of the M.P.S. Applicants will suffer undue hardship and extraordinary and compelling circumstances exist. Fact that Council rezoned land without personal notice to Appellants is a matter which can be considered under 63(7).

NSMB-22-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal by **ROCKY** and **WANDA REID** from a decision of Kings County made September 6, 1988, which refused to rezone the Appellants property on Prospect Road, New Minas, from Environmental Open Space (O1) Zone to Major Commercial (C1) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: WANDA and ROCKY REID, on their own behalf;

JAMES DEWAR, LL.B., for the Municipality of the County of Kings.

HEARING DATE: February 1, 1989.

DECISION DATE: February 22, 1989.

DECISION: Appeal Allowed.

DECISION

Rocky and Wanda Reid live in a mobile home on the Prospect Road in New Minas, Kings County. Their land is next to a brook which is the boundary between the Town of Kentville and the Village of New Minas.

The land is owned by Betty Lou Reid, Rocky's Mother. Sometime between March and October, 1980, the mobile home was placed on the land. In the fall of 1984 the Reids moved a garage to the property. They obtained a permit from the

Municipality to use the garage for storage.

Rocky Reid owns a wrecker. He began towing vehicles some years ago. He stores the wrecker in the garage on his property. Although he has no formal training, Rocky Reid has developed skills as a mechanic. Initially he just worked on his own vehicles. People began asking him to fix their vehicles. Mr. Reid said that he could not earn enough money to support his family towing vehicles. His work as a mechanic provides additional income. Although he did at one time work for someone else, he now operates the car and truck repair business on the property.

The County of Kings has two Municipal Planning Strategies (M.P.S.). The New Minas Sector Plan deals specifically with the Village of New Minas and was adopted in 1975. Council reviewed and amended it in 1982. The second M.P.S. covers the rest of the County and was adopted in 1979.

In the original New Minas Sector Plan there was confusion over the boundary between Kentville and New Minas. As a result, the Reid's property was not included in the area covered by the Plan. It was included in the rest of the County and was zoned Country Residential (R5) Zone.

When Council reviewed and amended the New Minas Sector Plan in 1982, they corrected the boundary with the Town of Kentville. The Reid's property now was included in the New Minas M.P.S. The land was subsequently rezoned as Environmental Open Space (01) Zone. This is a logical zone for this land since it is located beside the brook. Policy 16 of Section 2.6 of the M.P.S. designates natural water courses and adjacent land as open space.

The Reids were given no personal notice of this rezoning. The County's evidence is that they followed the procedures in the Planning Act respecting an amendment to the M.P.S. It is not clear from the Zoning Map, Exhibit R-6, or the oral evidence when the 01 designation was placed on the property. It could not have been before 1982 since the property was not included in the New Minas M.P.S. until that time.

Under the Land Use By-law the Environmental Open (01) Zone does not permit the carrying on of a car and truck repair business.

A neighbour of the Reids complained to the County about the car and truck repair business. The County applied to the Nova Scotia Supreme Court, Trial Division to have the Reids cease operating a business on the land on the basis that it violated the County's Land Use By-law (L.U.B.). The case was settled by an agreement that the Reids apply for a rezoning to permit the business to operate. A decision on one aspect of the case, which is not relevant to this appeal, is reported at Kings (County) v. Reid (1988) 39 M.P.L.R. 161.

Following the Reid's application to rezone the land, Paul Dunphy, Senior Planner with the County, prepared a report. He noted that the site is an environmentally sensitive area because of steep slopes and the brook. The area on which the mobile home and garage are located is small and "hazardously located on the edge of the slope". He pointed out that a car and truck repair business can only operate in the Major Commercial (C1) Zone. The only land that Council can rezone to Major Commercial (C1) Zone is in the Business District.

Mr. Dunphy also pointed out that one of the policies of the New Minas Sector Plan is to reduce the potential for conflicts between residential development and incompatible uses. The land across the road from the Reids is zoned Residential. The zone runs from the Prospect Road to Highway 101. The Reid property is approximately one-half mile to the interchange of Highway 101 and the Access Road.

Mr. Dunphy recommended that the Environmental Open Space (01) Zone remain.

The Reids and their lawyer made presentations to the New Minas Area Advisory Committee and the Planning and Recreation Advisory Committee. Both these Committees recommended against the rezoning. Council agreed and denied the application to rezone.

Mr. Dunphy assisted the Reids in seeking an alternative site and contacting appropriate Government agencies for a grant. He said that in the end the grants which would be available would be too small. The Reids would have to place themselves in substantial debt if they wished to relocate the business. If they cannot continue to operate the business, the Reids feel that they will be forced to go on welfare. The Board accepts this as true.

The Board has reviewed the New Minas Sector Plan. The Board is satisfied that Council's decision to refuse to rezone the property reasonably carries out the intent of the Plan. Generally the Board may not allow an appeal if Council's decision reasonably carries out the intent of the M.P.S.

Under Section 63(7) of the **Planning Act**, however, the Board may allow an appeal, if in the opinion of the Board,

a) the applicant would suffer undue hardship; or

b) extraordinary and compelling circumstances are present.

To date, the Board has not allowed an appeal under Section 63(7). In the Board's opinion, this is an appropriate case in which to exercise its discretion. The Board is of the opinion that the applicants will suffer undue hardship and that extraordinary and compelling circumstances are present.

When the Reids placed the mobile home on the land, it was zoned Country Residential (R5) Zone. The L.U.B. permits Home Occupations in the R5 zone with certain conditions. Mr. John Warden, Development Officer for the County, stated that a car and truck repair did not come within the definition of Home Occupation. The Board has reviewed the definition and believes that it could include this type of business. There are, however, restrictions on home occupations in the R5 Zone. Home occupations are not permitted within the 01 zone.

The Reids were not personally advised that Council had changed the zone to 01. The **Planning Act**, does not make it mandatory for Council to advise the individual property owners. In the Board's opinion, however, this is a matter which can be considered by the Board in determining whether undue hardship or extraordinary and compelling circumstances exist.

Robert Elliott, the Director of Planning, Development and Recreation for the County, stated that Council advertised the changes in the newspaper. There is evidence that Rocky Reid is illiterate. There was confusion over the boundary and a small portion of the County was changed from one M.P.S. to another. That small portion included the subject property.

It is clear from the evidence that the Planner believed that the Reids' property was included in the New Minas M.P.S. when they placed the trailer on the land. This was incorrect. The Board learned that the property did not come under the New Minas M.P.S. until 1982. Unfortunately, when Mr. Elliot clarified this matter, he did not specify when the land was actually rezoned. The 1984 permit indicates that the property was zoned R1 and not 01. It may be that the change to 01 did not occur until after the 1984 permit was issued.

In his closing comments, Mr. Dewar noted that Council had no choice but to refuse the rezoning. He went on to state that the Board did have a discretion to take into account the human factor in this case. Mr. Dewar subsequently sent a letter to the Board in which he argued that the Reid's should not benefit from Section 63(7) since they had begun the business knowing that it was illegal. He also pointed out that the Board must balance the interests of the rest of the community in having the M.P.S. complied with.

The Board acknowledges that the Reids operated the business after their permit had been turned down. The Board is satisfied, however, that Mr. Reid started the business as a result of requests from individuals to work on their cars. The evidence suggests that it was a gradual development from repairing his own vehicles to operating a business.

William Campbell lives near the Reids. He is a veteran living on a small pension. He said that if it wasn't for Rocky Reid, "I couldn't get my car repaired". Don Beugher, another resident, said that Rocky Reid had little schooling but had developed a skill as a mechanic. He pointed out that Rocky Reid works hard and pays his own way. He further stated that it would be "a tragedy" to place the Reids in the financial position of owing money.

The County took action in this case because of a complaint by one of the Reids' neighbours. Mrs. Reid presented a petition signed by a number of County residents in support of the rezoning. A number of their neighbours attended the Board hearing. Those who made presentations were all in favour of the rezoning. No member of the public spoke in opposition to the rezoning at any of the meetings of Council or its Committees dealing with this matter.

The sentiment of all the residents who came forward to speak at the hearing was that the Reids should be allowed to continue to operate the business. There was, however, one person who pointed out that the Reid property had not been kept as tidy as it should be. The County does have authority under its by-laws to deal with unsightly premises. If the Reids do not maintain their property then the County will be within its rights to prosecute them.

Mr. Dewar has suggested that by allowing the appeal the community perception will be that one can benefit from ones own wrong. The Board does not think that that is the community's perception in this case. The Board's impression is that the community believes the Reids should be allowed to make a living rather than being forced to go on welfare.

Under Section 63(7) the Board may allow an appeal by an applicant even though Council's decision is reasonably consistent with the intent of the M.P.S. This is an extraordinary power. By enacting such a provision the Legislature must have intended that there would be cases where a Land Use By-law could be amended or revised despite being inconsistent with the intent of the M.P.S. In the Board's opinion this is a case to which Section 63(7) applies.

The Board allows the appeal and instructs Council to amend the Land Use By-law by rezoning the land on the Prospect road in New Minas owned by Betty Lou Reid and occupied by Rocky and Wanda Reid from Environmental Open Space (O1) Zone to Major Commercial (C1) Zone.

Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of February, A.D., 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

FRIZZEL ET AL v. COUNTY OF COLCHESTER & SAYWOOD DEVELOPMENT LTD.

PLANNING - L.U.B. AMENDMENT - R-1 TO C-2 TO PERMIT CONVENIENCE STORE - NO SPECIFIC PROPOSAL - COLCHESTER M.P.S. POLICY 60.

Appellant residents in area where convenience store proposed. A Junior High School is across the street. The Planner advised Council that the rezoning met all requirements of the M.P.S. and that the rezoning was mandatory. Council rezoned the lot from R-1 to C-2.

HELD: **Appeal allowed.**

Council's decision does not reasonably fit within the intent of the M.P.S. Council had not considered a general implementation policy as well as the criteria for rezoning. Council must consider traffic congestion, parking and general appearance.

NSMB-26-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, as amended, by **MRS. ANNIE FRIZZELL, MRS. HEATHER MacDOUGALL, MR. GLEN STRATTON, MR. ROSS FERGUSON** and **MRS. AUDREY TRITES** from a decision of the Council of the Municipality of the County of Colchester made the 5th day of October, 1988, which decision was to amend Schedule "3" of By-law 40 by rezoning the lands bearing P.I.D. No. 20061123 from Dwelling Zone R-1 to Local Commercial Zone C-2.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: JAMES F. RICHARDS, Q.C. on behalf of the Appellants, Mrs. Annie Frizzell, Mrs. Heather MacDougall, Mr. Glen Stratton, Mr. Ross Ferguson and Mrs. Audrey Trites;

MALCOLM MacLEOD, LL.B. and LOGAN BARNHILL, LL.B., on behalf of the Municipality of the County of Colchester;

DAVID SCAMMELL for Saywood Developments Limited, an "Interested Party".

HEARING DATES: JANUARY 10, 1989
JANUARY 11, 1989.

DECISION DATE: FEBRUARY 23, 1989.

DECISION: APPEAL ALLOWED FOR SOME APPELLANTS.

DECISION

This is an appeal under the **Planning Act**, S.N.S., 1983,

c. 9. **MRS. ANNIE FRIZZELL, MRS. HEATHER MacDOUGALL, MR. GLEN STRATTON, MR. ROSS FERGUSON** and **MRS. AUDREY TRITES**, all appealed the October 5, 1988, decision of the Council of the Municipality of the County of Colchester. That decision allowed rezoning from R-1 Single Family Zone to C-2 Highway Commercial Zone, of a lot on the south side of College Road, Bible Hill. The lot was at the southwest intersection of an unnamed street and College Road running south therefrom to a proposed subdivision. The Interested Party, **SAYWOOD DEVELOPMENTS LIMITED**, made the application to rezone.

Under Section 16(1), c. 9, S.N.S. 1981, the **Municipal Board Act**, the Chairman assigned Board Member, Richard L. Weldon, to determine this appeal.

The Board heard this appeal at its 10:00 a.m. January 10, 1989, sittings held in the Municipal Council Chambers, Truro. At the end of the first day of the hearing the Board viewed the site. On the second day, the Board heard argument from all the parties, present and on record. It reserved its decision.

The Board received the Notice of Appeal (dated November 2, 1988) on November 4, 1988. Counsel for the Appellants assured the Board that the newspaper publication of the Notice of Decision was on October 18, 1988. Counsel for the Municipality consented to the jurisdiction of the Board. The Board therefore accepts the date of publication of the Notice of Decision as being October 18, 1988.

Section 63(2) of the **Planning Act** requires the Notice of Appeal to be served on the Board within twenty-one (21) days of the publication of the Notice of the adoption of the Land Use By-law Amendment. This Notice of Appeal was served in a timely manner.

The Notice of Appeal states in its grounds:

> "1. THAT the rezoning is inconsistent with and does not carry out the intent of the Municipal Planning Strategy; and
>
> 2. THAT the deliberations and resulting decision indicated that Council did not refer to, or explicitly disregarded, the terms and objectives of the Municipal Planning Strategy; and
>
> 3. Such other grounds as may appear."

The Board received, under separate cover, an undertaking to pay the cost of the advertisement of the Notice of Hearing.

The Municipality consented to the Board's jurisdiction to hear this appeal on its merits. The Board satisfied itself that all the Appellants, with the possible exception of Heather MacDougall, had met all procedural requirements necessary to support the jurisdiction of the Board. The Board found that all the Appellants, with the exception of Heather MacDougall, were aggrieved persons at least within the meaning of Section 61(1A) of the **Planning Act.**

Heather MacDougall did not testify before the Board. Other witnesses alluded to the fact her land was somewhat near the subject property. On the evidence before it, the Board is unable to find that Mrs. MacDougall was an aggrieved person within the meaning of Section 63(1)(1A) of the **Planning Act.**

The evidence was insufficient to prove her aggrieved. Section 63(1)(1a) is modified by subsection 63(1A). Section 63(1A) extends the previous definition of aggrieved person. To qualify under this Section, an individual must have a bona fide belief he is aggrieved. There was no evidence that satisfied the Board what Heather MacDougall believed. The Board has no statement from Mrs. MacDougall concerning her bona fide belief. She cannot qualify under this extended definition of aggrieved person. As the Board is unable to find Heather MacDougall an aggrieved person, it declines jurisdiction to hear her appeal.

The general Bible Hill area has been described in Schedule "A", "Excerpts from the Municipal Planning Strategy" in its history section.

The Applicant corporation owns the subject land in Bible Hill. It is a lot on the south side of College Street. It lies at the entrance to a large block of land leading to a proposed residential subdivision. The Applicant also owns and is developing this residential subdivision. The main feeder road from this subdivision will make a corner with College Street and the eastern boundary of the lot. Almost immediately opposite the subject land is a junior high school of 550 students. The Appellants live within varying degrees of proximity to the subject land. Some live east and west on College Street. Others live in a subdivision leading north off College Street slightly to the west of the subject lands.

This is a single lot rezoning. The Applicants say they intend to sell this lot to a person who wishes to build a convenience store there. There was no specific proposal or plans put before Council.

Mr. Richards, the Appellants' solicitor, called Annie Frizzell, Glen Stratton, Ross Ferguson, Audrey Trites, Lynn Burley, Carol Thibideau, Robert Christiensen and Dale Sabean. Mr. Scammell for the interested party called one of its principals, Richard Eisener. Messrs. Barnhill and MacLeod called Stewart Bishop and Dwight Higgins.

Ross Ferguson, a teacher, indicated his house is located on the north side of College Road almost opposite the subject land. He said he, his wife and his mother-in-law own all the properties there. Behind their properties is situate the Bible Hill Junior High School. He said the neighbourhood was quiet and it was friendly, there were no vandalism problems. He expressed concerns that his residential area would get the litter left by the customers of a convenience store. He pointed out that commercial signs would disfigure the neighbourhood. He felt the traffic flow would increase. He felt that the school children would cross the street to go to the convenience store. He said that College Road is relatively level in the area and cars race on the road despite the school zone. He felt the value of his property would be depreciated by the rezoning.

Mr. Ferguson noted there was no definition of convenience store in the by-law.

Mr. Ferguson said he heard that the proposed building on the subject property was going to contain 21,000 square feet. A long-time resident of the area, he sees no need for a convenience store. Many are already found in Truro.

Mr. Ferguson said he had attended all the public meetings concerning this rezoning. That includes two Council meetings, a meeting of the Bible Hill Village Commission and, in particular, a Public Participation Meeting (PPM). He said that at the PPM Mr. Scammell and Mr. Eisener spoke in favour of the application. Several other people spoke against the application. He said his son, Lyle Ferguson, was a major spokesperson for the group at the public hearing opposing the application.

Mr. Ferguson said Mr. Sabean, principal of the nearby Junior High School, had made public remarks about the rezoning. Mr. Ferguson wished to repeat Mr. Sabean's remarks to the Board. The Board would not permit this hearsay because of the likely crucial nature of Mr. Sabean's evidence. The Board suggested that if Mr. Sabean had any objections to this rezoning, the Board ought to hear them firsthand. The Applicants might also wish, in the circumstances, to be able to cross-examine Mr. Sabean.

Mr. Ferguson said that the former principal of the high school, a Mr. Gogan, was a member of the Village Commission. He had voted for the rezoning. Mr. Ferguson noted the disruption of the neighbourhood a store would cause. This witness also pointed out there were unknown commercial uses possible after the rezoning since there was no specific proposal before Council.

Mrs. Trites, a homeowner on the south side of College Road 200 feet west of the subject lot, repeated the same concerns. Her description of the neighbourhood was the same as Mr. Ferguson's. There is a sidewalk on the north side of the highway on the opposite side of the road from her house. There is no sidewalk on her side of College Street to handle pedestrian traffic.

Mrs. Trites said she goes over to Pictou Road to a convenience store which is perfectly adequate for her.

Mrs. Trites said that she and another person circulated a Petition which was signed by a large number of people opposed to this rezoning. Opponents of the rezoning brought this Petition to Council. This Petition, as amended (addresses added) by her after its presentation to Council, forms Exhibit F-12 in this hearing. Mrs. Trites said that when she and Mr. Richards circulated the Petition, many of the people were unaware of the development proposal. She said the public reaction was at least 85% against the rezoning.

Mrs. Trites operates a hairdressing salon in her home which generates very little vehicular traffic. She says there is a used furniture store in the area with low traffic demands also.

Glen Stratton is an associate professor at the Agricultural College. He said he bought his house in a residential, quiet neighbourhood with building restrictions on it intending that it stay that way. He is opposed to the development for the reasons stated by the other witnesses. He worries about probable traffic increases caused by the rezoning.

Lynn Burley says that she has lived in the area for 8 years. She purchased in this area because of the country atmosphere and the quiet residential neighbourhood. She attended the October 5, 1988 meeting where the rezoning decision was made. She said the other witnesses accurately addressed her concerns. She says that there is no necessity for the convenience store. Convenience stores located elsewhere adequately service her street. She cannot find a definition of a convenience store in the L.U.B. The L.U.B. does not contain any conditions regarding convenience store size, bulk, and so on.

Carol Thibideau of 62 College Road has lived in the neighbourhood for 18 years. She expressed the same concerns and agreed with the previous witnesses. Mrs. Thibideau admits that she is not directly affected by the rezoning because from her home, she cannot see the subject property. Her home is too far to the east of the subject property and on the other side of a hill. She frankly admitted there was a large block of undeveloped land opposite her house. She was assisting her neighbours to reject this development anticipating their assistance in rejecting any development proposed opposite her house.

Annie Frizzell of 736 College Road testified much to the same effect as the other witnesses. She wondered whether the existence of a convenience store will raise the risk of robberies being committed in the area.

Robert Christienson testified that he was the Treasurer of the Village Commission of Bible Hill. He says in planning matters the Bible Hill Village Commission has an advisory role to Council of the Municipality. He said the vote recommending this rezoning passed (5 Commissioners in attendance) two in favour, the Chairman not voting and two abstaining.

Mr. Scammell kindly put on his witness, Mr. K.Eisener, before Mr. Richards had finished his witnesses. At that time Mr. Richard's final witness was not yet available.

Ken Eisener testified that he lived at 49 Regency Drive. He is an officer of the Applicant. He is an engineer and he had been in the construction industry since 1974. He was presently active in three subdivisions and he was an engineer/consultant/planner for Keddy's Motor Inns.

Mr. Eisener agreed that the L.U.B. lacked a degree of certainty. He said it could use more regulations concerning the definition of convenience stores.

Mr. Eisener addressed the need for a convenience store in this area. He said need existed because the Applicant had four offers to purchase the property (one of which it has accepted) leaving three back-up offers.

Mr. Eisener felt that the rezoning study should inquire into pedestrian safety and traffic patterns.

Mr. Eisener says that the applicant is trying to be a responsible developer. He said that principals of the applicant intend to live in the proposed subdivision and currently live in the general area. Mr. Eisener says that he studied other properties surrounding convenience stores in commercial zones. He found that the assessments, in such circumstances, went up rather than down.

Dale Sabean the principal of the Bible Hill Junior High School then gave evidence for the Appellants. Mr. Sabean had expressed a reluctance to attend a public Municipal Board hearing. The opinions he expressed were his own. Although he expressed opinions made in relation to his duties, they were not necessarily the opinions of his employer. (The Board had expressed in the clearest of terms to Mr. Richards that if he wished to have Mr. Sabean's views weighed by the Board, he would have to produce Mr. Sabean as a witness. Over the break, it was apparent that Mr. Richards was able to persuade Mr. Sabean to attend.)

Mr. Sabean said that about 125 students walked to school each day. Only four or five of those students have to cross College Road. They are mostly young teenagers. He said during the school hours he does not allow students off the premises. He said that a store immediately across the street would increase his troubles in supervising this particular regulation. He said that he felt a store would generate a great deal of litter, garbage and loitering. Given his preference, he would prefer, from a school point of view, a convenience store at least one-half a mile away. He notes that the school has a cafeteria and he allows no one to take food outside the cafeteria area. He said there are some 500 students in the school in total. A convenience store right across the road from the School might tempt them to visit.

Stuart MacMillan Bishop of 121 Pictou Road is the Director of Planning for the Municipality. He was the first witness for the Municipality.

Mr. Bishop has worked in Planning for the Municipality since 1964. He graduated from Nova Scotia Technical College in 1960 (now TUNS) as a civil engineer. He has been employed as a planning engineer since. He worked with the Department of Municipal Affairs from 1960 to 1964. He then worked as a Planner with the Municipality of the County of Colchester. He has worked with the present M.P.S., L.U.B. and assisted in its construction and that of its predecessor. He is a member of the AIP, perhaps now the APA. He has taken correspondence courses. He has attended MIT.

Mr. Bishop in the course of his duties attended some of the Council meetings dealing with this application to rezone by Saywood Developments. He also, at about the same time, processed a somewhat similar rezoning application of the Arco Development land further west down the road.

Mr. Bishop said he recommended against the Arco subdivision because it was larger than the normal lot size. He said he recommended the Saywood application because it was a normal lot size. He says authority for this proposition is on page 30 of the L.U.B. He says 660 sq. m. is the size of lot permitted. He said the Saywood lot met this criterion for a lot.

Mr. Bishop is of the firm opinion, repeatedly expressed, that Policy 60 is the only M.P.S. policy dealing with this application. In his interpretation, this policy leaves no alternative but to recommend Council approve the rezoning.

After protesters spoke at the public hearing, Council sent the application for rezoning back to P.A.C. After P.A.C. reconsidered it, P.A.C. sent the application back to Council again.

Mr. Bishop said all Councillors were present when he gave advice that the Policy P-60 was the only applicable policy. He advised them they had no choice but to approve the rezoning.

Mr. Bishop did not attend the October 5, 1988 Council Meeting. He did not file a written report to any of the committees or to Council. Mr. Bishop firmly opined, as well, there could be no control under a C-2 zone of the floor area of any building. He said that the failure of Council to legislate L.U.B. controls under Section 53(f) of the **Planning Act** prohibited any such limitation of area.

When Mr. Bishop's evidence tended towards the expression of opinions as opposed to the expression of facts, some discussion arose between the Board and Mr. MacLeod. The Board asked whether or not Mr. MacLeod wished to qualify Mr. Bishop as an expert witness. Mr. MacLeod originally felt not.

After an adjournment, Mr. MacLeod applied to have Mr. Bishop qualified as an expert witness. He wished to qualify Mr. Bishop as a witness entitled to give opinion evidence concerning planning matters in the County of Colchester with special reference to the Village of Bible Hill. After a voir dire on the subject, the Board held him so qualified.

Mr. Bishop was of the firm opinion that on this rezoning the application met all the criteria of the M.P.S. He felt that the scheme was fully within the intent of the M.P.S. Mr. Bishop says that the M.P.S. and L.U.B. for Bible Hill are relatively uncomplicated compared to others across the Province. He says Bible Hill's M.P.S. and L.U.B. have worked out well, administratively.

Mr. Bishop conceded that one generally finds a greater degree of incompatibility between adjacent commercial zones and residential zones than there would be between two different adjacent residential zones.

Mr. Bishop again reiterated on cross-examination that there was no policy to consider other than P-60. He again repeated that no report had been filed.

Mr. Bishop said it was the responsibility of the Chairman of the P.A.C. to advise Council.

Mr. Bishop agrees there is no definition of a convenience store in the L.U.B. and would have preferred a definition. He wondered how far, however, definitions have to go.

Mr. Bishop said there were side yard restrictions sufficient to control the development.

Mr. Bishop said there were signage restrictions in the L.U.B. dealing with residential lots but none dealing with industrial or commercial lots.

Mr. Bishop said that Council cannot approve a Bible Hill rezoning to C-2 except on a single lot too small for further subdivision.

Dwight Higgins of 31 Hickman Drive is a technical instructor at the Agricultural College. He has been a Councillor representing District 13 (which means he is one of the Councillors for the Village) for nine years. He is also the Deputy-Warden of the Municipality. Previously, he had five years experience as a Village Commissioner of Bible Hill.

Deputy-Warden Higgins said that Bible Hill was a growth area. He said that he had served on P.A.C. and he has been Chairman for five years. He worked on the development of the present M.P.S. He said there was ample opportunity for participation by the public in preparing the M.P.S. for over one and one-half years.

Deputy Warden Higgins, at the P.A.C. meeting, outlined the general nature of the present application on the map. He pointed out to P.A.C. the L.U.B. policies. P.A.C. decided they needed more information regarding school and pedestrian traffic. P.A.C. consulted the Department of Transport. The Department of Transportation sent a letter dealing with this request which included some thoughts from Mr. Sabean.

Deputy-Warden Higgins said that he explained all relevant portions of the L.U.B. and M.P.S. to P.A.C. He said the P.A.C. recommended the rezoning to Council unanimously.

Deputy-Warden Higgins said at Council he spoke first. He introduced the application to Council and pointed out the pertinent sections of the M.P.S. and L.U.B. He said that, at this public hearing, Lyle Ferguson spoke on behalf of the residents against the application. He said that Mr. Eisener spoke on behalf of the Applicant.

After that public hearing, the Council referred the matter back to P.A.C. for further consideration as a result of the petitions. At the P.A.C. meeting on September 21st there was further discussion.

Deputy-Warden Higgins said there are no other convenience stores on College Road.

On October 5, 1988, there was a meeting of Council. The rezoning resolution passed. The vote was 5 to 4. Deputy-Warden Higgins voted against the rezoning. Deputy-Warden Higgins said this application received the most thorough investigation of any single planning matter he had experienced.

Deputy-Warden Higgins thinks that a convenience store would be a valuable addition to the neighbourhood. He said the only reasonable decision for Council was to rezone the property. He did not support the rezoning with his vote because the people he represented were against the rezoning. He voted against it.

On questions from the Board, Deputy Warden Higgins said that he relied on Mr. Bishop for his planning evidence. He said he heard Mr. Bishop's testimony. He agrees with Mr. Bishop's interpretation of the Planning Act, the L.U.B. and the M.P.S. It was this type of information that Deputy Warden Higgins said he communicated to Council at the October 5th meeting.

This concluded the evidence.

Mr. Scammell pointed out that his Company was a reputable developer. He said it planned to develop land in this area for at least another 15 years. It needed good relations with the community and with the Municipality to accommodate its developments. He said that it wanted to see good development in the area and that was its sole objective.

For the Municipality, Mr. MacLeod argued that the M.P.S. required that Council pass the L.U.B. amendment. He said the Appellants' theory that the existing L.U.B. did not meet the intent of the M.P.S. was not before the Board. He argued that no appeal lies to the Board when Council passes the M.P.S. and the L.U.B. at the same time and the Minister approves the package.

Mr. MacLeod went on to argue that, in any event, the decision of Council was fully within the intent of the M.P.S. He said even if it was not fully within the intent of the M.P.S. it could reasonably be said to be within the intent of the M.P.S. In either case the decision must stand. The Board had no power to interfere with it.

Mr. Richards went on for some time saying that the L.U.B. did not follow the intent of the M.P.S. As it did not, the decision to amend the L.U.B. could not fall within the intent of the M.P.S. He further went on to say that, in any event, the amendment to the L.U.B. did not meet the intent of the M.P.S.

He cited several previous Board cases which he asked the Board to consider.

Section 2 of the **Planning Act** sets out the purposes of the Act. One of the purposes under Section 2(b) is to enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban renewal character through the adoption of Municipal Planning Strategies, the Land Use By-law and subdivision by-laws consistent with the Policies and Regulations of the Province. Under Section 36(1) of the **Planning Act**, the Municipality may adopt a Planning Strategy for all or part of the Municipality. There may be separate strategies for different parts of the Municipality. Under Section 36(2) of the same statute the M.P.S. takes effect upon and not before approval by the Minister.

The Board agrees no one can appeal to the Board a L.U.B. passed and approved together with the M.P.S. (See Section 51(1) of the **Planning Act**).

Section 51(2) of the **Planning Act** prohibits a Council from adopting a L.U.B. except to carry out the intent of the M.P.S. It is a matter of simple logic to conclude a L.U.B. which does not carry out the intent of the M.P.S. does not exist.

It is a court's jurisdiction to deal with such matters and strike down such a L.U.B.

The Board notes that it has jurisdiction to hear only certain types of appeals of L.U.B. amendments. It has no jurisdiction to strike down L.U.B.'s which do not carry out the intent of a M.P.S.

The Board's power to deal with L.U.B. amendments on appeal flows from Section 51(1A) of the **Planning Act**. On the other hand, those by-law amendments do not come into force until the time for appeal has elapsed and no one has appealed. After someone has appealed, the amendment comes into force after all appeals have finished with the amendment affirmed. (See Section 59(3) of the **Planning Act**).

This appeal deals with a type of L.U.B. amendment contemplated by Section 51(1A) of the **Planning Act**. In the facts of this case Section 63(1A) of the **Planning Act** defines "an aggrieved person". Such a person has a right to appeal this rezoning decision of Council. Several have so appealed. The Board has a duty to determine whether the decision of Council, so approved, reasonably carries out the intent of the M.P.S.

Section 63(5) of the **Planning Act** prohibits the Board from allowing the appeal unless the Board determines that the decision of Council cannot reasonably be said to carry out the intent of the M.P.S.

In dealing with a zoning appeal from a rezoning decision, the Board must look to Section 63(4) of the **Planning**

Act. This Section allows the Board:

(a) to confirm the decision of Council; or,

(b) to allow the appeal by reversing the decision of Council amending or revising the Land Use By-law; or,

(c) to allow the appeal by instructing the Council to amend the by-law in a manner prescribed by the Board.

All counsel conceded that the alternative in this case of Section 63(4)(c) of the **Planning Act** was not before the Board. There was not sufficient evidence for the Board to draw a detailed by-law amendment to meet the expressed concerns. The Board was simply not well enough informed to follow that alternative. As well the Board would have to order a generic rezoning to supplement the site specific rezoning. Here the Board will not do this.

Mr. Bishop said it would be unfair, while amending the L.U.B. by a site specific amendment, to add generic controls in the same amendment. Such generic controls could meet the objections raised by many of the objectors to the rezoning.

On this point, on balance, the Board feels Mr. Bishop is likely correct. Previous Board decisions have gone both ways. Busche et al v. Mahone Bay (NSMB-7-88-P), (unreported) supported a generically changed rezoning whereby the Board ordered Council to enlarge the zone definition to accommodate a type of development not previously permitted.

Saveur v. Amherst (1987) 6-B M.B.D. 16, allowed the Town to pass a generic rezoning change and a site specific rezoning pursuant thereto at the same meeting. Although refraining from allowing the appeal, the Board frowned on the practice.

MacIntyre v. Municipality of the County of Cape Breton (1987) 6-B, M.B.D. 616 adopts for itself to Saveur. At page 623 the Board says:

> "The Board ruled that the proper procedure for Council to follow is:
>
> To firstly pass the amendment to its Land use By-law creating a new 02-B-Zone and then after this amendment came "into force" following the expiration of the appeal period it could have then validly and effectively amended its Land-use By-law rezoning the Y.M.C.A. lands ...{new} Zone."

The Board in MacIntyre struck down the rezoning because it had a different test to apply than the Board had to apply in Saveur. In Saveur there was an M.P.S. In MacIntyre there was none.

Pelly (cited later in this decision) required both a site specific rezoning and generic changes in the L.U.B. to allow the proposed use. Council turned down the rezoning. The Board, on appeal, upheld Council's decision.

Mr. Bishop says he was unaware of these decisions. The Board feels that a generic L.U.B. amendment would likely interest more people than a site specific one. If both are necessary to achieve a certain result, the Board agrees with Saveur and says the best practice is to first make the generic change. Once that amendment is in "force and effect", the site specific L.U.B. amendment could then be processed. The Board feels Mr. Bishop was correct in saying that to process both a site specific rezoning and a sheltering generic rezoning at the same time is "unfair".

That left, under this Section, the Board with two alternatives:

1. under Section 63(4)(a), to confirm the decision of Council; or,
2. to allow the appeal under Section 63(4)(b) and to reverse the decision of Council amending the L.U.B.

The Board has a duty to determine whether or not the decision of Council reasonably falls within the intent of the M.P.S. Counsel for the Appellant cited a Heritage case decided by Chief Justice Cowan with no specific citation which stated this point. The Board found the case in 50 N.S.R. (2d) 352. The Board in no way disagrees with the proposition cited for that case.

The Board in practice has evolved over some time guidelines for councils and planners on L.U.B. amendments. These guidelines, and the extent to which councils and planners follow them, assist the Board in determining whether a council's decision has reasonably followed the intent of the M.P.S.

Counsel cited Benedict v. The Town of Truro (1985), Vol. 4-B, M.B.D. page 290. The issue in that case was whether, in considering a development proposal which it approved, Truro's Council improperly considered the M.P.S. On page 292 in the headnote, there is this statement:

> "The Planner for the Town says that he considered them, and that the P.A.C. and Council rely on him to consider

> them. Council itself must consider all these items and cannot delegate this function."

That headnote is a good starting point for the reasoning of this decision.

The Board has a duty to look at the entire M.P.S. That view was expressed by the Appeal Court on appeal from the Board in Town of Kentville v. Laba, 38(1988), M.P.L.R., 170:

> "The proper function of the board is to judge rezoning applications in light of municipal planning strategy policies. In this case, the Board considered the entire municipal planning strategy of the appellant. The appellant's proposed development plan was contrary to the intent expressed in the policy statements".

At page 176 Pace, J.A.:

> "In the present appeal the board did not consider Policy K-4(A) in isolation, but also considered Policy K-4(B) and noted that council had not considered this policy statement when it approved the proposal. Clearly the board considered the entire municipal planning strategy of the town and same to the conclusion...".

In Finlayson v. Town of Sydney Mines, 1987, 6-B, M.B.D. 163 at page 163, the headnote says this:

> "The Board accepts that the Town is in need of economic expansion and notes that the MPS favours economic expansion. However, the uses permitted by the proposed rezoning would be potentially incompatible with the adjacent residential land uses. This potential incompatibility cannot be controlled by the existing by-laws controlling the C-1 zone. Therefore, Council in its decision has made no adequate provision to meet the intent of the MPS for buffering, landscaping and screening as is contemplated by Policy H-6(e). The Board must find that the decision of Council cannot reasonably be said to carry out the intent of the MPS."

In the Finlayson case, the Municipal Planner responsible advised against the rezoning. At page 174 of Finlayson, the Board said:

> "On the evidence before it the Board is unable to determine whether the balance of neighbourhood views is pro or con the proposed rezoning....
>
> Having reviewed all of the evidence and the applicable law, the more pertinent portions of which are summarized above in this Decision, the Board finds that the uses permitted by the proposed rezoning would be potentially incompatible with the adjacent residential land uses and that this potential incompatibility cannot be controlled by the existing by-laws controlling the proposed C-1 Zone. Council therefore, in its decision to rezone, has made no adequate provision (and under its existing C-1 zoning by-law could not have made any provision) in the decision to meet the intent of the MPS for buffering, landscaping, and screening as is contemplated by Section H-6(e) of the Town's MPS. The Board must therefore find that the decision of Council appealed herein does not reasonably meet the intent of the Town's MPS...and it determines that the decision of Council cannot reasonably be said to carry out the intent of the MPS...".

Counsel for the Appellants cited Oickle v. Town of Bridgewater, (1987) 6-B, MBD, page 548. The Applicant asked Council to rezone a corner lot from Residential Single Family to Neighbourhood Commercial to permit a convenience store. Council approved the rezoning and various neighbours appealed. The Board dismissed the appeal. In the headnote at page 548 there is this statement:

> "There is a separation from the immediate residential area. This location of a neighbourhood commercial use would not be an intrusion into the residential character of the area that would cause it to be degraded. Similarly the proposed commercial use is not inappropriate by the criteria of MPS...".

At page 563 of the decision the Board says:

> "...there are sufficient controls in the Land-use By-law to reduce any conflict with adjacent or nearby land uses; that the site is suitable for the proposed use; and that the developer's proposals for buffering, landscaping, and screening, if implemented, together with the approvals required for road access, will reduce any potential incompatibility with adjacent land uses and traffic arteries."

There was mention made of an unreported case of Wallace v. The Town of Truro (NSMB-601-87-P). At page 10 of that decision there is this statement which the Board views with approval:

> "The Board wishes to note that the Planner's Report which was prepared for both the 1986 application, which was withdrawn, and the present application contained considerably more detail than the earlier one and reviewed not only relevant policies but the Board's previous decision.
>
> An issue which the Board raised is the weight that is to be given to the evidence of persons who have been qualified as experts in planning matters. The Board was particularly concerned with the experts' interpretation of the various policies in the M.P.S.... [at page 11] The Board is unable to find any statement...that Council's decision does not reasonably carry out the intent of the M.P.S. Mr. Birch stated on several occasions that Council was required to approve the application because it met all the requirements. He also stated that Policy P-212 was mandatory given the opening words "Therefore it shall be a policy of Council to:". These words appear in every policy of the M.P.S. and do not in the Board's opinion make Policy P-212 mandatory.
>
> ...The Board has in the past stressed that where the M.P.S. refers to "the proposal" Council must consider the various criteria in light of the proposed scenario. A rezoning application is based to a certain extent on trust.
>
> [page 13]...One of the Board's main concerns in Benedict was the fact that Council had delegated to the Planner the duty to consider the criteria in Policy P-501. ...The Board's role is not to impose its own view

> but to determine whether or not Council's decision was reasonably consistent with the intent of the M.P.S."

Council must consider this L.U.B. amendment in the context of the Implementation and Administration provisions of the M.P.S. starting with Policy 79. (All references are quoted in the attached Schedule "A"). Policy 79 requires Council, in addition to the specific policy criteria and specifications set out in the M.P.S. and L.U.B., to deal with certain other listed considerations.

There is no evidence before the Board that the Council considered Policy 79(d). This policy deals with the adequacy of existing and proposed essential services including water supply, sewer, storm drainage, and streets. There was no report before Council on these matters. The Planner did not testify as to these matters before the Board. He did not mention them (according to the Minutes and according to his own evidence) before Council.

To the Council of this Municipality, concerning Bible Hill Village, these may be a given. All municipal councillors may already know all these details. There is nothing to show Council considered these matters at all. No one touched on them. These services, their relative absence or presence, would have had a bearing on the present rezoning application.

This Municipality covers a large geographic area and has more than one M.P.S. within that area. Bible Hill is only one small area within the Municipality. It has its own M.P.S.

The Board cannot in these circumstances assume that Council was knowledgeable of the Bible Hill M.P.S. to the extent of knowing its intent without full, correct explanation of its professional planning advisor. The Board expects the Municipal Council, in the absence of a refresher report by the Planner, would likely be unaware of the suitability of Bible Hill's infrastructure to support this rezoning scheme.

The Board finds Council failed to consider Policy 79(d) of the M.P.S. as it applies to this rezoning. This finding is sufficient in itself to resolve this appeal in favour of the qualified Appellants.

In relation to Policy 79(c), the absence of proof of any Council consideration is not necessarily fatal to this application. The Board might assume from the small size of the lot involved there would be, outside of the necessary crosswalks, little public cost burdens on the Municipality or Village.

The Board notes there is no need, under Bible Hill's M.P.S., for Council to have regard for a specific proposal for a L.U.B. amendment. Council need merely study any request for a L.U.B. amendment. On the other hand, the absence in the M.P.S. of any requirement for a specific proposal allows Council to consider the worst case scenario on any rezoning amendment.

The Board now will consider whether Council followed Policy 79(a) in dealing with this L.U.B. amendment.

Absence of a Planner's Report, absence of detailed specifications given by the Planner verbally before Council prevails here. These lacunae make it difficult for the Board to determine whether or not this rezoning application was in reasonable conformity with the intent and specifications of the M.P.S. They deter the Board from easily making a finding one way or another on the subject. The Board cannot say "Yes, the intent of the M.P.S. was properly before the Council" as it did in Pelly et al v. Town of Bridgetown (1988), NSMB-3-88-P (unreported). The "report", verbal or otherwise, given to the P.A.C. by the Planner, contained clear errors. These errors would likely have had the effect of misleading Council had Council known of, or paid attention to, the "report".

The "report" clearly misled the Deputy-Warden who said he endorsed the policies advocated by the Planner.

One error made by the Planner is his definition of the word "lot" as defining a suitable situation for C-2 rezoning. The interpretation he set out before us said that a lot had to be no smaller than a minimum sized lot under the L.U.B. It had to be somewhat smaller than a double sized lot under the minimum requirements of lot subdivision approval. He said he looked at such definition in the L.U.B. He made his decision against one current rezoning and in favour of this particular one based on that definition of "lot".

The definition of "lot" that he relied on was number 32 definition in the L.U.B. at page 6 (See Schedule "A"). This definition clearly contains two separate types of lots, one being a lot that is capable of being approved on an approved plan of subdivision. He ignored the other definition of a lot. The other type of lot is an area of land separated from adjacent areas of land by being described in a deed. This lot could be of any size. It could be certainly much larger than the theoretical size of land just under the size of a double "subdivision lot".

The Planner further went on to say that a lot used in the By-law for approval had to be singular. He went to the L.U.B. for his authority for this proposition. He said Policy 60 used the word "lot". The L.U.B. at page 12, paragraph 4 says: "Words used in the singular number include the plural. Words in the plural include the singular". The planner had obviously no regard for that particular section of the L.U.B. when he was looking for the definition of "lot" in the L.U.B. to apply to the M.P.S. policy on rezoning to Commercial C-2.

A quick perusal of the M.P.S. would show as well that lot size could be much larger than the area he thought appropriate.

The predominant consideration of the lot specifications for the zone on which the land is situate as described in the M.P.S. for Bible Hill. The M.P.S. incorporates the L.U.B. by reference. Page 7 of the M.P.S. deals with exceptions to lot specifications. These exceptions deal with existing lots prior to zoning. All the emphasis is on under-sized lots and how to develop the under-sized up. No one contemplates "oversized" lots. Page 19 of the M.P.S. makes reference to lots with no attempt to define them. Page 24, Policy 25 makes reference to lot size, that they must retain the ground water supply. One can only assume that the larger the lot the easier it would be to maintain groundwater supply. Page 29 under Residential Land-Use Policy refers again to under-sized lots by current standards. Again, no policies deal with "oversized" lots. The Board concludes that, in this M.P.S. or L.U.B. there is no such thing as an "oversized" lot.

The Planner was clearly wrong to use his lot size criterion as a basis to accept this rezoning or to reject the other one.

Council, of course, could have been fully aware of the totality of the intent of the M.P.S. and all documents incorporated into the M.P.S. by reference. It could possibly have made its decision with such full knowledge of all the necessary criteria.

The Board commends the practice of documenting the relevant intents of M.P.S. by checklists. It commends the planner presenting the checklist to P.A.C. and to Council. This practice makes sure that Council has before it all relevant considerations. Meeting a lesser concern, such practice informs any Board testing the decision of a council against the intents of the M.P.S., what intents were at least exposed to Council's view.

It is obviously impossible for one person to ever be certain of the subjective intent of another person when they make a decision. Devices do not yet exist which allow one person to read accurately, at all times, the mind of another.

In determining another's intent, a person must look to objective manifestations which allow him to draw certain conclusions as to that intent which are most probably correct.

As an aid to drawing such inferences, the Board endorses again the procedure endorsed by the Board most notably in Benedict. These procedures require the Planner consider the relevant portions of the **Planning Act** and the M.P.S. He must then report fully on those matters, in writing, to Council. Such reports are good objective manifestations (assuming such reports are correct) that Council has been exposed to the proper relevant portions of the M.P.S. With such exposure their decisions are much more likely to fall, reasonably, within the intent of the M.P.S. The procedures followed by the Planner in this case provided no such protection.

The Planner was not aware of any Board decisions that might help him in interpreting the M.P.S. for Council. He has not read any Board decisions since the inception of the Board (according to his frank admission). This may explain his failure to follow the guidelines contained in certain decisions, some of which have existed since 1985.

The Planner was also clearly wrong when he said that Policy P-60 is a mandatory policy requiring council to approve any application for local commercial zoning by-law amendment in any area designated residential. In the heading of that policy itself, the M.P.S. notes that particular attention must be paid to the potential for disruption these uses may cause since they must necessarily locate among the residential uses they serve. Traffic congestion, parking and general appearance are matters that Council must address.

Parking was not addressed. General appearance was not addressed. Traffic congestion was inadequately addressed in any studies made.

Some argued that general appearance could not be dealt with under the L.U.B. and this may be correct. If it is correct, then the Board suggests there is nothing in the L.U.B. to allow for this particular application. Therefore the principles enunciated in Finlayson apply here. Council cannot make a L.U.B. amendment that will deal with this aspect of the case without making criterion amendments to the L.U.B.

P.A.C., at least, considered traffic. The Department of Transport sent a letter which is before the Board in Exhibit F-11, page 24. Assuming Council knew of this letter (there is no evidence to support that assumption), the letter details criteria of installing crosswalks. Following this non-responsive recital of crosswalk specifications, the letter deals with a recital of a conversation with Dale Sabean. According to the letter, Mr. Sabean states that students will not be allowed to leave the school grounds during school hours.

The Board has heard directly from Mr. Sabean and has had the benefit of his evidence under direct and cross-examination.

Mr. Sabean said that the Junior High School was immediately across the road from the subject site and had some 500 students. He said all but 100 or so of those students rode busses to and from school. He said and only 4 or 5 students, at the most, crossed the road ordinarily in the run of the day at present and that only three or four went home for lunch. School rules confine the rest of the students to the school grounds from the time school opened until the time it closed. He said there was a cafeteria for the students to eat in the school. School rules prohibit students taking food outside of the cafeteria.

Mr. Sabean very carefully pointed out that he had a problem keeping the students on the school grounds during school hours, especially during recess. The presence of a corner store across the street would exacerbate that problem.

Mr. Sabean said he felt he would be able to maintain the present disciplinary situation with some difficulty. (School disciplinary problems do not appear as a concern in the M.P.S.). Having seen him and heard him, the Board concedes he likely could. Yet before and after school hours considerable extra pedestrian traffic from the school across the street to the convenience store and back would likely occur. The Board doubts whether or not Mr. Sabean's authority would be able to extend to regulate all this activity.

According to witnesses, Mr. Sabean expressed his views at a previous public hearing. One cannot tell from the Minutes.

It is very clear, however, that the letter of the Department of Transport does not set out this position of Mr. Sabean. His expressed position impressed the Board. The Board believes Council did not direct its attention to this particular aspect of traffic congestion and traffic risk for students across a highway with sufficient clarity so that it could make an intelligent decision based on this real problem. The problem, if stated to Council at all, was stated in the misleading terms of the D.O.T. letter.

Mr. Bishop is clearly incorrect when he says that Policy 60 is mandatory and requires a rezoning. He is also incorrect when he says that there is no possibility under the M.P.S. of setting up a building area control and lot controls in the L.U.B. by rezoning amendments. Such controls have not been put in the L.U.B. for this C-2 zone. That is admitted. Under the M.P.S., perhaps the L.U.B. should contain such controls for convenience store rezoning.

Council has chosen only to make a site-specific change. By making prior generic changes by amendment to the L.U.B. to install M.P.S. mandated controls, Council might have brought its decision within the intent of the M.P.S.

It is not for the Board to tell Council what it ought to have done.

The Board merely says that Council's decision in this case has been tested against the M.P.S. Its decision does not reasonably fit within the intent of the M.P.S. Therefore, the

Board allows the appeal for the Appellants other than Heather MacDougall, and reverses the decision of Council. The Board dismisses the Appeal of Heather MacDougall for want of jurisdiction.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of February, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM EXHIBIT F-7

MUNICIPAL PLANNING STRATEGY AND LAND USE BY-LAW

VILLAGE OF BIBLE HILL, MUNICIPALITY OF THE COUNTY OF COLCHESTER

...

Municipal Planning Strategy as passed ...Municipality of the County of Colchester ... November 4, 1986, and approved by Minister of Municipal Affairs December 16, 1986.

PREAMBLE

[page 1]

This Municipal Planning Strategy was prepared as a review of the Municipal Development Plan adopted in 1978. The review was conducted by an Area Planning Advisory Committee comprised of the Commissioners of the Bible Hill Village Commission, and the Councillors representing Districts 1 and 13 on the Council of the Municipality of the County of Colchester.

...

This review process...includes...regulation...by the new Planning Act, 1983.

This Municipal Planning Strategy and the Land Use By-law contain policy direction and regulation detail respectively. The Municipal Planning Strategy is generally divided into subject areas related to types of land use, each containing discussion and rationale for the policy statements that follow. the details and procedures that carry into effect these policies form the content of the Land Use By-law which is similarly divided into subject areas.

...It is quite apparent that specific situations will arise that cannot be accommodated within these documents. In such instances, policy or regulation can be amended through a process provided for by the Planning Act. This process ensures there will be public involvement, and opportunity for proponents of change, as well as those opposed, to be heard. There is recourse to appeal to the Nova Scotia Municipal Board for parties involved.

[page 2]

PURPOSE

To guide decision making with respect to the regulation of development and the provision of public services and facilities within the village.

GOALS

...

(b) To provide a land use pattern in which the various uses are compatibly located, sufficient to accommodate future growth.

...

(d) To establish a set of policies that will provide guidance, direction and encouragement for both the public and private sectors within the Village of Bible Hill.

(e) To establish a set of policies to guide the administration and any subsequent amendment of the Municipal Planning Strategy and Land Use By-law.

(f) To protect existing residential development from encroachment by incompatible development.

[page 3]

HISTORY

...

By the mid 1800's, Bible Hill was the cultural and administrative centre of the region, having a Court House, Registry of Deeds and other public offices.

This prosperity continued until the construction of the Intercolonial Railway and station in Truro in 1872, at which time the focus of activity shifted to the opposite shore of the Salmon River. With the incorporation of Truro in 1875, Bible Hill remained in the Municipality of Colchester.

Since that time, Bible Hill has evolved into a predominantly residential community with extensive educational and institutional facilities. The Nova Scotia Agricultural College established in 1885 is continuing to develop into a major educational facility.

...

[page 4]

...

Bible Hill was incorporated in 1953 and has a current approximate population of 5,000. It is administered by a Village Commission consisting of five members and clerk-treasurer. The village is divided into two municipal districts (1 and 13) each represented by an elected member who sits on Municipal Council.

...

[page 5]

...Give the porous nature of the soils and relatively level topography, much of the rainfall and snowmelt percolate down to recharge the groundwater regime. This is significant as the residents of Bible Hill depend on groundwater for domestic purposes.

...

[page 6]

II. GENERAL LAND USE POLICY

II. (A) THE DIVISION OF LAND

Land parcels can be subdivided or consolidated, or parcel boundaries modified. The predominant consideration is the lot specifications of the zone in which the land is situate, as described in the Land Use By-law for Bible Hill.

...

Land Use By-law - The zoning map divides the village into zones, and the text lists lot specifications. These specifications determine what can be done at time of subdivision in any given area, unless there is specific exemption.

...

[page 7]

II. (B) EXCEPTIONS TO LOT SPECIFICATIONS

Subdivision and development of land in Bible Hill has been occurring for a much longer period of time than there have been controls, so there are parcels of land which cannot be economically used or subdivided under normal by-law provisions.

...

[page 8]

...Such a case is where two or more main structures - several houses, or a house and business for example - are located on one lot. Where it is desired that division of the lot be made...

...

[page 9]

POLICY 5 It shall be a policy of Council that notwithstanding usual zone specifications, where an area of land is to be added to an undersized lot otherwise legally in existence, the resulting lot may be approved even though it does not meet zone specifications.

...

[page 18]

II. (G) PARKING AND LOADING AREAS

Provision of space for vehicular parking is necessary for the efficient use of land and safe movement of traffic. The number of parking spaces provided should be proportional to the type of land use being served. Additionally, commercial uses need space not only for staff and customers, but also for the loading and unloading of delivery vehicles.

Where there is contact between different use designations, problems can occur in that the development of commercial parking areas can infringe on the integrity of the neighbouring non-commercial use. Where this is the case, particular separation distances shall be required to minimize the conflict.

POLICY 18 It shall be a policy of Council to establish parking standards in the land use by-law for various land use types.

POLICY 19 It shall be a policy of Council to require commercial and industrial uses to provide space sufficient for the loading and unloading of commercial vehicles.

POLICY 20 It shall be a policy of Council that where general commercial, industrial and institutional uses abut residential use designations, no parking or storage will be permitted in the abutting required yards, to minimize the disruption of the abutting residential use designation.

[page 19]

...

POLICY 21 It shall be a policy of Council to regulate the parking or storage of commercial motor vehicles on lots in residential areas.

[page 20]

II. (H) SIGNAGE

Signs are an essential element of the conduct of business, however, signs can also be a considerable visual intrusion if too numerous, overly large or high, inappropriately located, or distracting due to colouration or lighting.

POLICY 22 It shall be a policy of Council to limit the size, height, lighting, number and location of signs as is appropriate in various zones.

[page 21]

II. (I) TRANSPORTATION

The efficient and safe movement of people and goods through and within a community is obviously desirable. In Bible Hill the responsibility for maintenance and improvement of the road network is shared between the Village of Bible Hill and the Provincial Department of Transportation.

In Bible Hill, Main Street, Brookside, College, Pictou, Vimy, Old Courthouse Branch, and Farnham Roads serve as collectors which gather traffic from minor local streets. The effectiveness by which these collectors perform can be negatively affected by uncontrolled development along their margins. Examples of such could include: strip commercial development increasing the number of access and egress points onto the collector; or, erection of structures too close to the right-of-way which could hinder improvements to the road at some time in the future.

POLICY 23 It shall be a policy of Council to:

a) list in the Land Use By-law those streets that now function as collector streets,

...

[page 23]

II. (J) WATER SUPPLY

The residents of Bible Hill draw their water supplies from groundwater sources. Most houses have on-site wells.

...

[page 24]

POLICY 24 It shall be a policy of Council to consider the impact of land use on water supply quality and quantity generally.

POLICY 25 It shall be a policy of Council to require lot sizes that reflect the need to maintain the groundwater supply.

[page 25]

II. (K) SEWER SERVICES

Bible Hill is served with a central sewage collection system which takes in virtually all the built up area...

...

It is the wish of Council that all sewage be treated before being discharged to the Salmon River.

...

POLICY 26 It shall be a policy of Council that all new development be connected to a municipal sewer system.

POLICY 27 It shall be a policy of Council that all sewage be treated before discharge to the Salmon River.

...

[page 29]

III. RESIDENTIAL LAND USE POLICY

The predominant use of land in Bible Hill is for residential purposes, and this indicates the village's primary function is as a dormitory community. It is the intention of this planning strategy that the village continue in this role and that policies adopted are aimed at maintaining a high quality of residential development in the future.

...

...many lots are undersized by current standards. ...

...

Dwellings in Bible Hill are generally connected to the municipal sewer system. Potable water is supplied through individual on-site wells. ...

It is intended that the village continue as an area of high quality residential neighbourhoods protected from non-compatible uses. further, it is intended that the architectural integrity of residential areas be protected from non-conventional types of structures.

It is recognized that residences may also serve as a base for small business and domestic arts...

...

[page 30]

III. (A) RESIDENTIAL POLICY - GENERAL

POLICY 35 It shall be a policy of Council to designate, on the Future Land Use Map, areas for residential and related accessory development.

POLICY 36 It shall be a policy of Council to zone existing residential uses to appropriate zones.

...

POLICY 38 It shall be a policy of Council to permit certain residential uses in commercial zones, subject to particular specifications and limitations for parking and the number of dwelling units.

[page 31]

POLICY 40 It shall be a policy of Council to zone all vacant land designated residential, to the single and double dwelling (R2) zone.

POLICY 41 it shall be a policy of Council to create a single dwelling zone (R1) and implement it by amendment to the zoning map within residential designations.

...

[page 38]

IV. COMMERCIAL LAND USE POLICY

IV. (A) COMMERCIAL POLICY - GENERAL

Commercial development in Bible Hill is principally located in two areas: the first being along Main Street from the Salmon River crossing to Farnham Road, with the greatest concentration at its intersections with College and Pictou Roads. the other area of commercial development takes the form of scattered occurrences along Pictou road, including a recently constructed small shopping centre. Isolated occurrences exist inter-mingled with residential uses in some parts of the village.

Bible Hill is located next to the larger retail centre of Truro and those established commercial operations satisfy much of the demand for consumer goods and services. As such, many of the commercial operations in the village take the form of small convenience or personal services stores.

A major concern with commercial uses involves the basic incompatibility of it with residential use, though inevitably there must be a transition from one use to the other. A buffer can be achieved in various ways - from limitations on use in required yards, fencing or landscaping - to using recreation or open space zones. Institutional uses can perform a buffering function between incompatible uses.

The north side of Pictou road has both considerable commercial development and areas of undeveloped frontage at present. It is intended to designate an area there for commercial use. ...

There is no evident correlation between the type of commercial uses and their location throughout the village. There are several businesses along Pictou Road for example, which would normally be found in a central business area, and similarly, commercial operations along Main Street which would be better suited to large lots along collector roads. This pattern of distribution has not created any great problems.

...

[page 39]

...

POLICY 55 It shall be a policy of Council to zone existing commercial uses to an appropriate zone.

POLICY 56 It shall be a policy of Council to permit certain residential uses, and mixed residential and commercial uses in a structure, in commercial zones.

POLICY 57 It shall be a policy of Council to set particular parking specifications for residential use in commercial zones.

[page 40]

IV. (B) COMMERCIAL POLICY - LOCAL

A second commercial concern is the location of corner stores, herein referred to as local commercial uses. Such uses are intended to serve the immediate neighbourhood, and not the community at large. Particular attention must be paid to the potential for disruption these uses can cause, since they necessarily must locate among the residential uses they serve. Traffic congestion, parking and general appearance are matters that must be addressed in specifications.

POLICY 58 It shall be a policy of Council to create a local commercial use zone (C2) and zone existing such uses to that zone.

POLICY 59 It shall be a policy of Council to set specifications for lot size, parking, yards, and yards that abut residential designations for general buffering.

POLICY 60 It shall be a policy of Council to permit future local commercial uses by amendment to the zoning map, in any area designated residential, and where the lot has frontage on a collector street.

...

[page 45]

VI. INSTITUTIONAL LAND USE POLICY

Institutional uses are those developments which are operated for the general benefit of society. These include public holdings such as schools...

Institutional uses are generally perceived as being compatible or non-disruptive with other uses. However, given the diversity of activities included under this general heading, some guidelines are warranted where the proposal involves the erection of structures and parking of vehicles.

...

[page 48]

IX. IMPLEMENTATION AND ADMINISTRATION

The Municipal Planning Strategy for Bible Hill will be administered by the staff of the County of Colchester, in accordance with the Planning Act.

The Planning Advisory Committee, in consultation with staff, and the Commission of the Village of Bible Hill, will consider and make recommendation to Council on the necessary and appropriateness of proposed changes to policy, specifications, and map schedules.

POLICY 79 It shall be a policy of Council, when considering a request for amendment of the Land Use By-law, in addition to the specific policy and criteria, and specifications set out in the M.P.S., L.U.B., and related schedules, to examine the following:

a) the conformity with the intent and specifications of the M.P.S. and

b) the conformity with other Municipal by-laws and regulations;

c) the financial capability of the County or Village to support any public costs;

d) the adequacy of existing or proposed essential services including water supply, sewer, storm drainage, and streets.

VILLAGE OF BIBLE HILL

LAND USE BY-LAW EXCERPTS

[page 1]

...

(B) DEFINITIONS

...

2. ACCESSORY USE means a use subordinate and naturally, customarily and normally incidental and exclusively devoted to a main use of land or buildings and located on the same lot.

...

[page 2]

...

10. BUILDING means any structure whether temporary or permanent, ...

15. COUNCIL shall mean the Council of the Municipality of the County of Colchester.

[page 3]

17. DEVELOPMENT OFFICER means the officer of the Municipality of the County of Colchester from time to time charged by the Municipality with the duty of administering the provisions of the Land Use By-law.

18. DESIGNATION means an area shown on the future land use map of the municipal planning strategy.

...

20. ERECT means to build, construct, reconstruct, alter or relocate...

22. EXISTING means:

a) in reference to a use or structure, that it legally existed on the effective day of this by-law.

b) in reference to a proposed use or structure, that a development and/or building permit had been issued prior to the effective date of this by-law, and that construction or use is commenced within the time limit prescribed for the permit.

...

24. FLOOR AREA

a) in reference to a structure, the total area contained within the outside walls,

...

[page 5]

...

d) commercial structure floor area means the area within the outside walls of the structure measured at the level of the main floor or floors.

...

[page 6]

...

31. LOADING SPACE means a vacant area of land provided and maintained upon the same lot or lots upon which the principal use is located.

32. LOT

a) means an area of land separated from adjacent areas of land by being described in a deed, or shown on an approved plan of subdivision.

...

[page 7]

...

33. MAIN BUILDING means the building in which is carried on the principal purpose for which the lot is used.

...

35. MAXIMUM LOT COVERAGE means that area of the lot covered by all buildings above ground level...

...

39. PARKING AREA means an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, customers, or residents with access for motor vehicles to and from a street or highway by means of driveways, aisles or manoeuvring areas where no parking or storage of motor vehicles is permitted.

40. PERSONAL SERVICE SHOP means a barbering, hairdressing, tailoring, draft, or similar shop that does not generate a high volume of customer traffic.

...

45. RETAIL STORE means a building or part thereof in which goods, wares, merchandise, substances, articles, or things are offered or kept for sale directly to the public at retail.

...

[page 9]

...

51. SHOPPING CENTRE OR MALL means a commercial use of land and structures designed, developed and managed as an inter-related group of commercial uses.

52. SIGN means any structure or device intended to identify or advertise a business or commercial activity.

...

56. STREET, COLLECTOR means a street listed in Schedule 4 of this by-law.

...

58. STRUCTURE means anything that is erected, built, or constructed of parts joined together or any such erection fixed to or supported by the soil or by any other structure.

...

60. YARD, REQUIRED means an open, uncovered, area of land on a lot measured inward and horizontally from a lot line.

61. YARD, REQUIRED FLANKAGE means the side yard that abuts a street on a corner lot, and it extends from the front to the rear lot line.

62. YARD, REQUIRED FRONT means a yard that extends across a lot between the side lot lines, abutting the front lot line.

[page 10]

63. YARD, REQUIRED REAR means a yard that extends across a lot between the side lot lines, abutting the rear lot lines.

64. YARD, REQUIRED SIDE means a yard that extends from the front to rear lot lines.

65. ZONE means an area identified on a zoning map.

[PAGE 11]

(C) ZONES AND ZONING MAP

...

1. Districts 1 and 13 of the Municipality of the County of Colchester are divided into the following zones, the boundaries of which are shown on the attached Zoning Map. Such zones may be referred to by the appropriate symbols.

ZONES	SYMBOLS
Residential Single Dwelling	R-1
...	
Commercial - General	C-1
Commercial - Local	C-2

...

2. Schedule 3 attached hereto may be cited as the "zoning map" and is hereby declared to form part of this by-law.

...

[page 12]

...

4. In the by-law, words used in the present tense including the future; words in the singular number include the plural; words in the plural include the singular number; and the word "used" includes "arranged", "designed or intended to be used"; the word "shall" is mandatory and not permissive.

5. For the purpose of this by-law, if a use is not listed as a permitted use in any zone, it shall be deemed to be a prohibited use in that zone.

[page 13]

PART II: GENERAL PROVISIONS

SECTION 1 - GENERAL PROVISION FOR ALL ZONES

SCOPE

(A) (1) No person shall hereafter use any land or erect, alter or use any building or structure unless a development permit has been issued and no development permit shall be issued unless all provisions of this by-law are satisfied.

(2) Any person who violates a provision in this by-law shall be subject to prosecution as provided for under Part XI of the Planning Act of Nova Scotia.

FRONTAGE ON A STREET

(B) No development permit shall be issued unless the lot or parcel of land intended to be used or upon which the building or structure is to be erected, abuts and fronts upon a street.

LICENCES, PERMITS AND COMPLIANCE WITH OTHER BY-LAWS

(C) (2) Where the provisions in this by-law conflict with those of any other village, municipal, or provincial requirements, the higher or more stringent regulations shall prevail.

[page 14]

...

PERMITTED ENCROACHMENTS IN YARDS

(H) Every part of any required yard shall be open and unobstructed by any structure, except minor architectural features such as eaves, cornices, bay windows, or canopies.

[page 15]

...

BUILDING TO BE ERECTED ON A LOT

(J) No person shall erect or use any building unless such building is erected upon a lot.

ONE MAIN BUILDING ON A LOT

(K) No person shall erect more than one (1) main building on a lot, except in an industrial, commercial, institutional, or mobile home park zone.

...

[page 16]

PART II - SECTION 2

(A) DIVISION OF LAND

Nothing in this by-law shall exempt any person from complying with the requirements of the Subdivision By-law or any other by-law of the Municipality.

...

[page 18]

...

(E) PARKING AND LOADING AREAS

(1) For every building or structure to be erected or enlarged, off-street parking located within the same zone as the use and having unobstructed access to a public street shall be provided and maintained in conformity with the requirements below.

TYPE OF STRUCTURE	PARKING REQUIRED
-a structure containing not more than three (3) dwelling units	one parking space for each dwelling unit
...	
[page 19]	
...	
-office and all other commercial uses	one (1) parking space per 30 sq.m. of floor space.

(2) PARKING LOT SPECIFICATIONS

Where parking facilities for more than 4 vehicles are required,

a) the parking area shall be treated so as to prevent the raising of dust and loose particles,

b) lights used for illumination of the parking areas shall be so arranged as to divert the light away from streets, adjacent lots and buildings,

c) the parking area shall be on the same lot as the use it is intended to serve,

d) no gasoline pumps or other service station equipment shall be located or maintained on the parking lot,

[page 20]

e) the location of driveways shall be no closer than 15 m. to the limits of the right-of-way at a street intersection.

f) the width of a driveway leading to a parking or loading area, or of a driveway or aisle in a parking area, shall be a minimum width of 3 metres if for one-way traffic, and a minimum of width of 6 metres if for two-way traffic, and the maximum width of a driveway at the street shall be 8 metres. Driveways or aisles must be provided to permit adequate ingress and egress from the parking area. Two driveways leading to or from the same parking area must be at least 30 metres apart at the street.

g) a parking space shall be 2.75 metres by 6 metres.

h) where commercial, industrial, or institutional uses abut a residential zone, parking and loading spaces shall not be located within the abutting required yard.

3. LOADING SPACE SPECIFICATIONS

a) In commercial, industrial, and institutional zones, one off-street space shall be provided for every 1000 sq. m of floor space or fraction thereof.

b) Each space shall be 3 metres by 12 metres with height clearance of 4.5 metres.

c) Notwithstanding (a) above, the provision of a loading space shall be optional where the main floor area is fewer than 100 sq. m.

d) Where commercial or industrial uses abut residential designations, parking and loading spacs shall not be located within the abutting required yard.

...

[page 21]

(F) SIGNAGE

All signs located within residential zones require a development permit. No sign shall exceed 0.5 metres in area. Ground signs shall not exceed 1 metre in height.

(G) TRANSPORTATION - COLLECTOR STREETS

(1) The following streets shall be collector streets:

...

2. College Road
3. Pictou Road
...
7. Old Courthouse Branch

(2) Amendments to the above list shall be by Land Use By-law amendment.

...

[page 23]

PART III (B) RESIDENTIAL - LOW DENSITY REQUIREMENTS

1. RESIDENTIAL SINGLE DWELLING ZONE (R-1)

a) the only permitted use is a single dwelling unit

b) home occupations are not permitted

c) lot specifications are as for the single and double dwelling zone (R-2).

2. RESIDENTIAL SINGLE AND DOUBLE DWELLING ZONE (R-2)

...

b) The following minimum specifications apply to all lots:

	Single & Double	Semi Detached
Area	660 square metres	660 sq. m.
Frontage	22 metres	22 metres
Required Yards		
-front	10 metres	10 metres
-rear	8 metres	8 metres
-flanking	5 metres	5 metres
-sides	3 metres, or 1 m. one side, with attached garage or carport except in a flanking yard	3 metres

...

[page 30]

PART IV (B) LOCAL COMMERCIAL C-2

1. The following are permitted uses in the C-2 zone:

- convenience stores
- personal service shops
- residential R-2 uses.
- veterinary clinics without outdoor kennels

2. The following minimum specifications apply to lots:

Area	660 sq. m.
Frontage	22 m.
Required Yards	
- Front	10 m.
- Rear	5 m.
- Flanking	5 m.
- Side	3 m.

3. Parking and loading space requirements are as set out in the General Section.

4. Parking and loading spaces are not permitted in required yards abutting residential zones.

...

BARNES v. TOWN OF NORTH SYDNEY

PLANNING - REFUSAL TO AMEND L.U.B. FROM R-1 TO C-2 - CONVENIENCE STORE.

G.B. appealed Council's refusal to rezone 7000 sq. feet of R-1 to C-2 to permit a convenience store where G.B.'s son could be employed. Chief of Police acting as Traffic Authority filed a Report advising Council of traffic concerns in area.

HELD: Appeal allowed and rezoning ordered.

Board found that the evidence adduced at the hearing did not substantiate the Traffic Authority's report. Board felt that Council was mislead by the report since all other planning criteria was satisfied.

NSMB-29-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal by **GLORIA BARNES** from a decision of the Council of the Town of Sydney Mines made December 12, 1988, which refused to amend the Town's Land Use By-law by rezoning the Appellant's property located at Civic No. 128 Fraser Avenue, Sydney Mines, Nova Scotia, to permit the establishment of a convenience store.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: H.F. MacINTYRE, LL.B., and GERRI O'SHEA, LL.B., for the Appellant;

WILLIAM BURCHELL, LL.B., for the Town of Sydney Mines.

HEARING DATE: March 22, 1989.

DECISION DATE: April 10, 1989.

DECISION: Appeal allowed.

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, Chapter 9.

The Appellant, **GLORIA BARNES**, with her Husband, is the owner of land at 128 Fraser Avenue, Sydney Mines, Nova Scotia. She appealed a rezoning refusal decision of the Council of the Town of Sydney Mines made December 12, 1988. Council refused to rezone a portion of her land at 128 Fraser Avenue, Sydney Mines, from Residential (R-1) to Local Commercial (C-2). She requested this rezoning to permit establishing a convenience store in part of the building located on that land.

She made an almost identical application to rezone the same lands before the Council earlier in 1988. Council turned it down at a Council meeting on November 14, 1988.

This is the first rezoning seen by this Board Member where an unchanged application so closely followed a previous application's refusal. The **Planning Act** does not prohibit successive rezoning applications.

The land to be rezoned has about 100 foot frontage on the southwest side of Fraser Avenue. It has a depth of some 70 feet. The Appellant wished to rezone about 7,000 sq. feet of land to Local Commercial (C-2). The appellant's entire lot in the area contains 1.5 acres (about 60,000 sq. ft.).

Fraser Avenue runs from the centre of the Town in a southeasterly direction downhill towards the sea. Opposite this development there is a sidewalk. The avenue width is 60 feet. The frontage of the subject lot is almost directly opposite an intersecting street (Brown Street). The subject land is within a couple of hundred feet of a curve on Fraser Avenue. It is also near a turn off to Memorial High School. Memorial High School is a school of some 1,700 students plus support staff and teachers, janitors and the like. The turnoff to Memorial School also serves from time to time as an unofficial turnoff to the Town's industrial park.

Under Section 16(1), Chapter 9, S.N.S. 1981, the **Municipal Board Act**, the Chairman assigned Member Richard L. Weldon to determine this appeal.

The Board heard this appeal at its 10:00 a.m. March 22, 1989, sittings held in the Town Council Chambers, Sydney Mines. After evidence and argument the Board viewed the site in conjunction with counsel. It reserved its decision.

Before getting to the meat of its decision, the Board will deal with certain minor matters pertaining particularly to this appeal.

On December 29, 1988, this Board Member was acting as telephone-receptionist for the Board. Other employees of the Board were absent at that time. He received a telephone message purporting to be from a Mrs. Barnes. During that telephone conversation he gave Mrs. Barnes certain indications of how, mechanically, to proceed with an appeal. He also made notes immediately after of his recollection of the conversation and what advice he had given. Those notes are Exhibit B-1 of the evidence before the Board. The Board has reviewed these notes. It has searched its memory. It can see no reason why it ought to disqualify itself from hearing this appeal.

The Member, as his main point, told Mrs. Barnes to be sure to get her Notice of Appeal filed in time.

Exhibit B-2 is the "FAXED" Notice of Appeal. This is a letter from Mrs. Barnes which she electronically filed with the Board on December 29, 1988.

The Rules of the Board, allowing for facsimile Notices of Appeal, came into force on January 1, 1989.

Exhibit B-3 is another Notice of Appeal partly in the form prescribed by the new Rules. The Board received it sometime later (January 19, 1989). Counsel for the Town objected that it disclosed no grounds of appeal. This was the only objection taken before the Board to the Notice of Appeal. The Board reserved on this particular point until after it heard the evidence. The Board informed counsel that it would then decide on the issue in its decision.

When Mrs. Barnes sent to the Board her FAX appeal on December 29, 1988 she was clearly within her appeal time. The then prevailing Rules did not prevent a FAX Notice of Appeal.

The Board by letter of January 4, 1989, had acknowledged this "FAXED" Notice of Appeal. It invited Mrs. Barnes to mail her second Notice of Appeal without specifying any change in content. The subsequent Notice of Appeal was on the form provided by the Board. This second Notice included a copy of the letter originally sent by FAX by Mrs. Barnes.

Counsel for the Town did not object to the timing of the Notices of Appeal. Town counsel said that the second Notice of Appeal disclosed no grounds of appeal.

Mrs. Barnes' grounds for appeal appeared in the text of her letter of December 29, 1988. She wrote: "It was turned down by Sydney Mines Town Council on December 12, 1988 - on the recommendation of the Traffic Authority."

The Board, having heard the evidence, agrees that this is an accurate summary of the issue that was before Council. Traffic Authority's advice would have allowed Council to turn down the rezoning application. The contested part of the evidence before the Board dealt with the accuracy of the Traffic Authority's report to Council. The appeal hinges on the accuracy of the Traffic Authority's Report to Council.

The Board assumes, from Mrs. Barnes' appeal from the decision (referring to the Traffic Authority), that she disagreed with the Traffic Authority. She felt he had not given Council the correct advice. The Board agrees that is the factual issue the Board has to resolve to discharge its duty in this appeal.

The Board finds the Applicant filed a timely Notice of Appeal (whatever rules were in effect) on or after December 29, 1988. The Board could recognize the FAX appeal, at least by January 1, 1989. The Board, on January 4, 1989, gave an implied extension to return by mail an additional Notice of Appeal. Mrs. Barnes filed her second Notice of Appeal on January 9, 1989. The Board finds that the Notice of Appeal prepared at that stage by Mrs. Barnes, a non-lawyer appellant, discloses grounds for appeal. It adverts to the main factual issue to be heard before the Board. The Board therefore finds that it has jurisdiction on this Notice of Appeal to hear the appeal.

The Board also would like to comment that the Town entered properly into the spirit of the new Rules. The Town's solicitor's Appeal Record, filed with the Board as Exhibit B-9, is a good example of such a document. The early provision of this document allowed all parties and the Board to focus on all the facts truly in contention. All parties then brought all evidence quickly to those facts.

Both counsel conceded there was no precise description available for the rezoning although they could easily make one. Both counsel agreed to meet forthwith to prepare a description. This would free the Board from a second hearing to obtain a correct description if it decided to allow the rezoning. The Board prefers precise descriptions to set rezoning boundaries, especially when one single lot is rezoned into two separate zones. Counsel had not provided the description by the end of the hearing but had agreed to do so shortly. Perhaps counsel should have prepared such a description for the original presentation to Council.

By FAX of April 5, 1989, counsel provided the Board with an agreed description. The Board attaches a copy of this description to the decision as Schedule "A".

Counsel for the Appellant called Gloria Barnes, Randall Barnes, Hugh Francis MacDonald and Todd Barnes. The Town called Harry Vickers and Malcolm Gillis.

This particular rezoning goes back to another application Council turned down in November which the Appellant did not appeal. She made this second application to rezone. She then appealed the second refusal decision of Council within time.

Council personnel changed between the two decision dates according to the Minutes. Whatever the reason for it, these successive applications for the same rezoning appear to be in accordance with the **Planning Act**. Council wisely treated, as will appear from its minutes, the two applications the same. Most of the remarks made for the first hearing are really applicable for the second.

In preparation for the first Council hearing, Malcolm Gillis, the planner, prepared a long detailed checklist. In this checklist he dealt with what he considered to be the applicable policies of the M.P.S. of the Town. In this long detailed report he wrote he had viewed the site. He felt there might be traffic concerns. In the conclusion of his report dated July 21, 1988, at page 6 of Exhibit B-9 he wrote:

> "Staff is convinced this development proposal is in conformity with almost all the zoning amendment criteria in the planning strategy. However, if the Traffic Authority is at all concerned about the potential traffic hazard, the staff of Metro Planning Commission recommends the Council reject this application."

After that report, Harry Vickers the Traffic Authority of the Town (and Chief of Police) filed a report dated November 9, 1988:

> "In respect to rezoning this area to commercial, I feel that traffic during normal conditions could allow for change. However, from carefully monitoring the traffic, both pedestrian and vehicular, I find that, prior to and after school hours as well as during the many functions that take place at Memorial, there is a great increase in traffic. School buses as well as students and staff, all use the Fraser Avenue entrance. With this being a connector road to the Industrial Park, even more traffic is anticipated in the near

> future. This has been the location of many accidents, some involving serious injury or fatalities. Although the third lane allows for a better flow of traffic travelling in a northwesterly direction on Fraser Avenue, we have to look at the traffic flow from the opposite direction as well. Delivery trucks, as well as customers stopping at this site, will create a concern for safety. During winter months with ploughing and slippery road conditions we have an increased road hazard, especially if a vehicle should stop along the roadside.
>
> In summary, I would say that the sharp curve on this portion of the road, along with a heavy flow of traffic, are prime concerns for safety conditions and Council should consider this when making its decision."

Council also received certain letters from certain citizens opposing this application.

On December 2, 1988, the Planner again submitted a report to the Town of Sydney Mines and he repeated the checklist. His recommendation was as follows:

> "Recommendation: The staff of the Metro Planning Commission believes the report of the Traffic Authority indicates that a commercial business at this site in proximity to a relatively dangerous sector of Fraser Avenue represents a potential traffic hazard. It is the recommendation of the Metro Planning Commission that Town Council seriously consider rejecting this application. It is our understanding this proposal would not be in compliance with the criteria established in the Municipal Planning Strategy."

Many of the facts before this Board are not in dispute between the parties. All concerned concede that Fraser Avenue is an arterial road or collector street in the Town. Fraser Avenue is one of the more heavily travelled streets in the Town, although not the heaviest travelled. All parties concede there is heavy traffic turning left on the nearby Fraser Avenue bend to get into the Memorial High School. From time to time cars get into the Industrial Park the same way over school property.

The Appellant and her husband said they are familiar with the traffic that the stocking of a convenience store would require. This is uncontradicted by any other evidence. The same trucks that already stop at the Memorial High School would also stock and stop at the Appellant's convenience store. This would mean 14 to 18 truck stops per week off Fraser Avenue that are not presently being made. The Appellant proposes to make a delivery entrance at the back of the existing building. The trucks would then pull off the road and pick up and deliver at the store's rear entrance. Delivery trucks would not therefore park on Fraser Avenue.

The L.U.B. on-site parking requirements mandates three parking spaces, one for the residential use and two for the proposed commercial use. Evidence shows there is room for a circle driveway on the commercial lot plus ten parking spaces in front of the building. The rezoned lot could accommodate off-street parking. The Appellant swore she has no objection to the Town posting the street frontage of her lot as "No-Parking".

Mrs. Barnes said her family, on this family homestead property, have made renovations to accommodate a convenience store. They intend to staff this store with their 23-year-old son Todd. Her son Todd, currently employed as a roofer, can then pursue a less strenuous occupation, that of storekeeper.

Mrs. Barnes works at Memorial High School and Mr.

Barnes is a seaman on the Canadian National.

Exhibit B-11, a medical report dated March 20, 1989, from one Liam L. McKeough, M.D., C.M.F., F.R.C.S.C., indicates Todd Barnes, Mrs. Barnes' son, has the following condition:

> "This letter is to inform that Todd Barnes, son of Gloria Barnes, Waterview Drive in Sydney Mines, is, in my opinion, severely crippled from a congenital left hip deformity. He has had at least three operations on the left hip through the years and may require further surgery. It seems that Mrs. Barnes has plans to open a convenience-type store and this certainly would be an ideal place for Todd to work - out of the cold and dampness into a dry and warm place of employment."

Todd testified before the Board. He said that he does not know how long he can continue his present occupation. He said that a Halifax specialist told him that a hip replacement is not a suitable operation for him at his age.

The Board has heard the expert planning evidence of Malcolm Gillis, the Town's Planner. It summarizes his evidence thus: the proposal meets all the requirements in the M.P.S. for this rezoning except those of traffic. He says that he had some traffic concern on seeing the site. He said he had not the time nor the staff to do the study necessary to make the traffic determinations. He referred Council to its Traffic Authority.

The Board has reviewed the whole of the Town's M.P.S. and its L.U.B. in an attempt to determine the intent of the M.P.S. On the evidence and after such perusal, the Board agrees with Mr. Gillis that the proposal meets the intent of the M.P.S. excepting possibly traffic requirements. Having determined the intent of the M.P.S., the Board must then test the decision of Council within the context of that intent.

The Board also has heard from a longtime inhabitant of the avenue, Hugh Francis MacDonald. He obviously keeps himself aware of the conditions on the avenue. He said a lot of traffic moves swiftly in the area. He said there have been, over time, very few accidents other than the fatal accident.

The Traffic Authority's report appears in full elsewhere in this decision.

The Board listened carefully to the Chief's examination and cross-examination.

The Board, having listened to all the witnesses who dealt with the traffic situation and having read the Chief's report makes these comments as to the accuracy of the facts contained in the report:

> 1. "I feel the traffic during normal conditions could allow for change."
>
> I assume the Appellants would agree with this comment and the Board accepts it as accurate.
>
> 2. "...from carefully monitoring the traffic". The Chief said under oath before this Board that he did nothing to monitor the traffic other than to make general observations. He could answer no questions as to traffic statistics and he had made no real effort to gather any. In the Board's mind, there is nothing wrong that he said there is an increase of traffic

because of the school. The problem here is his letter creates the impression that he had done a careful monitoring of the traffic. That is just inaccurate. The Board thinks this statement would have been quite persuasive in the minds of any councillor reading this report.

3. "With this being a collector road to the Industrial Park". His own evidence shows that this is inaccurate. The "access" to the Industrial Park is over the Memorial High turnoff. The School Board from time to time cuts off access to the Industrial Park. Other evidence, (including the M.P.S. itself) shows that the Industrial Park is underdeveloped, despite some growth in the last year and a half. The Chief writes that more traffic is anticipated in the near future. This statement has no foundation on the evidence the Board has heard.

4. "This has been the location of many accidents, some involving serious injuries or fatalities". On cross-examination it is very clearly shown there was a fatality in this area some 14 years ago. The Chief had been rear-ended when he was parked on the side of the street in the last three or four years. There is evidence of one or two other accidents somewhere on the mile length of Fraser Avenue. That is all. The theme of his report shows adverse traffic conditions in this general area of the corner of Memorial High turnoff. The Board, on the evidence

before it, finds that is not so.

5. "I would say the sharp curve on this portion of the road". It is clear from all the maps there is no sharp curve. When pushed in evidence, the Chief said the curve was "sneaky". He also admitted in evidence that since the fatal accident and since his succession as Chief of Police some years ago the curve that did exist had been banked. Since that time the Town established a third lane to assist in the turnoff to Memorial High School. In his evidence, the Chief conceded that the speed limit was 50 km per hour all the length of Fraser Avenue. He had put no "No-Parking" signs anywhere on Fraser Avenue. The Chief's only change to control traffic was to put a four-way stop at the head of Fraser Avenue. This was some considerable distance from the subject site. He felt he had the authority to put "No-Parking" signs in front of the proposed store, for example.

The Chief in his report did not address the real problem this development could have with traffic. The proposed use would increase the number of traffic movements in and out of this particular property. These extra traffic movements flow from on-site truck deliveries plus the traffic movements generated by any customers of the store. The traffic generating these movements already passes the site without stopping. These extra traffic movements obviously do not exist at the present.

If the rezoning permits the proposed development, the extra traffic movements will appear. The traffic, itself, already exists.

These traffic movements, the appropriate traffic concern, would have to be studied in relation to the avenue's existing traffic. The Board feels the incorrect unsubstantiated statements of the Chief offer Council no support for its decision to deny this particular proposal. The Chief does not have specific facts or special observations, on which to base his statements. His general observations, on which he now claims to base his statements, have not stood up under the test of cross-examination.

The Board finds itself with a planner who relied on the Chief of Police and a Council which could have relied on the Chief of Police. All the evidence demonstrated to the Board that the Chief of Police did not have the facts to back up his report's statements and context.

The Board went to view the site. A view might show whether, in fact, there were the adverse traffic conditions that the Chief's written report indicated. On its short view the Board saw nothing to show Fraser Avenue could not handle any extra traffic movements generated.

The Board, on a view, does not attempt to substitute its own observation for those of witnesses who have demonstrated accuracy.

Hugh MacDonald impressed the Board. It believes his recollections concerning traffic conditions on the avenue is better than that of the Chief of Police. When their evidence is in conflict, it accepts that of the witness, Mr. MacDonald.

The Board's duty (Section 63(3) of the **Planning Act**) is to determine whether Council's decision reasonably carries out the intent of the M.P.S. The Board shall not allow the appeal unless the decision of Council does not reasonably carry out the intent of the M.P.S. (Section 63(5) of the **Planning Act**).

If the Chief's report of November 9, 1988, were correct in its facts, its text would support Council's decision. Genuine traffic concerns could allow Council to decide this particular rezoning did not fall within the intent of the M.P.S. Council's decision to refuse rezoning by a small majority would be correct and the Board could not reverse Council's decision.

No further studies, no further substantial evidence was brought between the two hearings of Council.

The Chief had, or ought to have had, access to the statistics necessary for him to give an accurate report on traffic. Some argument was made that the financial resources were not available for the Chief to do this. If it wishes accurate studies, Council must fund them. Accurate studies should assist Council to make its rezoning decisions reasonably within the intent of the M.P.S.

The report of the Traffic Authority in this case is inaccurate and could have, and probably did, mislead Council. Council was mislead on a material particular in dispute, that of traffic. Therefore, its decision cannot reasonably carry out the intent of the M.P.S. The traffic objection fails. The proposed development, having no valid traffic objection, falls reasonably within the intent of the M.P.S.

Counsel for the Appellant has also argued for relief under Section 63(7) of the **Planning Act**.

In view of the Board's decision on other grounds, the Board will not decide these arguments now. It does note, in passing, that the hardship appears to be to the Applicant's son rather than to the Applicant herself. The Board does not see unusual or exceptional circumstances to cause the Board to overrule Council's decision. The Board is not deciding these issues, it merely mentions them because, in argument, counsel for the Appellant did.

The Board under Section 63(4)(c) of the **Planning Act** allows the appeal. It instructs Council to amend the By-law in the manner prescribed by the Board.

The Board will prescribe the L.U.B. to be amended by adding to the C-2 Zone approximately 7,000 sq. feet of land at 120 Fraser Avenue described in Schedule "A" to this decision

The Board will not order Council rezone without a precise description in such circumstances as exist here. The Board will embody the Schedule "A" description in its order.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of April, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

ALL that certain lot, piece or parcel of land situate, lying and being at Sydney Mines, in the County of Cape Breton, more particularly bounded and described as follows:

Beginning	at a point on the south western boundary of Fraser Avenue, the said point being 299.4 feet north westerly from the intersection of the said boundary of Fraser Avenue, and the production south westerly across the said Fraser Avenue of the south eastern boundary of lands conveyed by the General Mining Association to R.H. Brown by deed dated December 8th, 1899, and recorded in Book 87, page 131, Registry of Deeds, Sydney, N.S.;
Thence	south easterly, along the said boundary of Fraser Avenue, a distance of 100 feet to a point;
Thence	at right angles south westerly, a distance of 67 feet, more or less, to the north eastern boundary of the Barrington Estate;
Thence	north westerly along the last named boundary, a distance of 100 feet more or less to a point;
Thence	north easterly, at right angles to the said Fraser Avenue boundary, a distance of 68 feet, more or less, to the place of beginning, and containing 6,750 square feet, more or less.

KNICKLE v. TOWN OF LUNENBURG & SWEENEY

PLANNING - DEVELOPMENT AGREEMENT - APPROVAL TO PERMIT 22-UNIT CONDO - POLLUTION - ARCHITECTURAL COMPATIBILITY - CHARTER OF RIGHTS, S. 7, 24(1), TOWN OF LUNENBURG M.P.S. POLICIES 3.4, 3.6, 3.11, 8.4.

G.K. appealed Council's approval to enter into development agreement to permit 22-unit condominium building. He argued that raw sewage from buildings would worsen existing pollution in Lunenburg's Back Harbour. The M.P.S. requires that primary architectural features of new buildings be visually compatible with characteristic architectural style in area.

HELD: Appeal dismissed.

While the M.P.S. is worded so that Council could insist on sewage abatement, Council's failure to mandate sewage abatement was not inconsistent with intent of M.P.S. There was evidence that architectural compatibility was followed. The Board cannot grant a remedy under Section 24 of the Charter until there is an infringement of a right under Section 7.

NSMB-2-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **GRAHAM KNICKLE** from a decision of **LUNENBURG TOWN COUNCIL** which approved the entering into of a development agreement with **MICHAEL SWEENEY** for a 22-unit condominium on Lot T-2, Cornwallis Street.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: GRAHAM KNICKLE, on his own behalf, Appellant;

PATRICK BURKE, LL.B., for the Town of Lunenburg;

ANTHONY ROBINSON, LL.B., for the developer, MICHAEL SWEENEY.

HEARING DATE: March 15th and 16th, 1989.

DECISION DATE: April 10, 1989.

DECISION: **Appeal Dismissed.**

DECISION

The Town of Lunenburg, like other seaside communities in Nova Scotia, dumps raw sewage into its harbours. This appeal raises questions regarding Council's right to permit new development which will increase the sewage and therefore increase pollution in the harbours.

The Town of Lunenburg has a Front and Back Harbour. It is divided into areas known as Old Town and New Town. Old

Town is laid out on steep hillsides facing south. The Appellant, **GRAHAM KNICKLE**, lives on the crest of one of these hills at 91 Creighton Street. Behind his property on the north is vacant land which is partially tree covered. This land runs down the hill to a highway known as the Bypass and then into the Back Harbour.

Michael Sweeney wishes to develop a 22-unit condominium on a portion of the lands behind Mr. Knickle's home. The 1.14 acre lot is one block long running between Cornwallis and Duke Streets. Mr. Sweeney purchased the land from the Town. A development agreement is required under the Town's Municipal Planning Strategy ("M.P.S.").

The proposed building is 250 feet long with 2 wings each 100 feet. Entrance is from the rear of the building with the front facing the Back Harbour. The building is wheelchair accessible. Although the proposed building is two stories high, it is to be built into the slope of the hill so it will not affect the view planes of the homes on Creighton Street.

Lunenburg has very distinctive architecture in the Old Town. One of the witnesses for the Appellant, Professor Grant Wanzall of the School of Architecture at T.U.N.S., gave a very interesting overview of the various architectural designs and details of the homes in Lunenburg. In his opinion the proposed building did not fit in with the character of the Town. He based his opinion on the photocopied drawings which were included in the Appeal Record. He was not shown the original drawings which were later introduced as exhibits.

Brenton Kaulback is the Applicant's architect. He testified that they had tried to incorporate some of Lunenburg's traditional design features in the proposed building. Each condominium unit has a wooden balcony which is covered by a gable roof. Windows are high and narrow in keeping with the Lunenburg style. The building will be vinyl sided in a clapboard style of 4 inches to the weather. Most of these architectural features are on the front of the building and will be seen from the Bypass.

The closest buildings to the subject site are the Cornwallis Apartments, a duplex and a Kent home. None of these 3 buildings exhibit the traditional Lunenburg designs. They are modern rectangular boxes. The homes on the north side of Creighton Street which back onto the subject property are a mixture of styles and ages. The houses on the south side of Creighton Street between Cornwallis and Duke Streets range in age from 1846 to 1941 according to the Inventory of Historic Buildings, Exhibit K-21.

A number of people made presentations to the Board. Some were against the proposal because of the potential increase in the pollution of the Back Harbour. Two Town residents spoke in favour of the proposal. Both women are renting apartments and are interested in moving to the building. In the case of Jessie Hopkins she requires an apartment which is wheelchair accessible so that her husband who is paraplegic may visit from the hospital.

The Town's M.P.S. was revised in 1985. There are a number of policies which Council must consider. The Town Planner, Ernie Brennan, prepared a Report for P.A.C. and Council which outlined the relevant policies and commented on them.

The Board has reviewed the M.P.S. The following policies relate to the issues raised in this appeal:

> "2.3 It shall be the intention of Town Council to encourage preservation of the architectural and cultural heritage of the Town and to minimize, to the extent possible, any negative impacts that may result from new development or redevelopment.
>
> 3.4 It shall be the intention of Town Council to require the developer of a subdivision to install sewers in accordance with the provisions and requirements of the Subdivision By-law, at the developer's expense.
>
> ...
>
> 3.6 It shall be the intention of Town Council that when any maintenance repairs or replacement or new installations of sewers... are carried out, that consideration be given to making any necessary provisions for eventual sewage abatement, particularly the reduction of water infiltration and the installation of interceptors.
>
> 3.7 It shall be the intention of Town Council to continue to seek the financial means to install and operate a sewage treatment system for the Town.
>
> ...
>
> 3.11 It shall be the intention of Town Council to permit the installation of on-site sewage disposal systems only in the rural areas of Town...
>
> 5.4 It shall be the intention of Town Council, when considering development agreements, to ensure that the architectural character of any proposed new building...will be compatible with the established architectural character of other buildings in the area, in terms of relationships of height, bulk, scale, roof

> shape, relationships of windows and door and architectural details.
>
> 8.4 When considering amendments to the Land Use By-law, and in considering development agreements in addition to all other criteria as set out in the various policies of this Planning Strategy, Town shall consider the following:
>
> ...
>
> c. that the proposal is not premature or inappropriate due to:
>
>> iv) creation or worsening of a pollution problem in the area such as but not limited to soil erosion and siltation of water courses;
>
> ...
>
> e) that the primary architectural features of the new building...including roof shape, proportions and relationships of windows and doors, and exterior cladding be visually compatible with other buildings in the area which collectively exhibit features that create a characteristic architectural style;
>
> f) that the height and bulk of the new building...shall be similar to the height and bulk of other buildings...in the area."

The Appellant relies on Policy 8.4(c)(iv) as his major argument. He argues that the raw sewage from the 22 units in the proposed condominium will worsen the existing pollution in the Back Harbour and therefore the proposal is inappropriate. He feels that Town Council should require Mr. Sweeney to install equipment to treat the sewage from the condominiums before adding it to the Town's sewage system.

The solicitor for the Town argues that Policy 8.4(c)(iv) refers to other kinds of pollution and does not include sewage pollution. He points to the policies which encourage development and permit developers to hook into the existing sewers. He further argues that a developer is not permitted to install on-site sewage systems except in rural areas.

Mr. Sweeney, the developer, stated that he had not considered installing a sewage treatment facility because he had proceeded on the basis of what he was told by the Town Planner. He believes that he is not required to provide such a system.

In reviewing the M.P.S. the Board noted Policy 3.6 which deals with sewage abatement. Since the interpretation of this Section was not considered during the hearing, the Board wrote to the parties asking for their written comments.

Although Policy 3.11 prohibits on-site sewage disposal systems in the area of the subject property, sewage abatement is not prohibited but is, in fact, encouraged by Policy 3.6. Policy 3.4 requires developers of subdivisions to install sewers.

Mr. Sweeney is buying one lot from the Town. The Town's land is being subdivided but Mr. Sweeney is not the subdivider, the Town is. Although he is developer, he cannot technically be considered a "developer of a subdivision" even though he is building 22 condominiums. The Condominium Act and Regulations made thereunder override the **Planning Act** with respect to the issue of whether or not a developer of a condominium is subdividing land. In this case a plan of subdivision is not required.

The evidence is that the project will only require a sewer line and not the installation of a sewer. In the Board's opinion, Council could, if it wished, read Policy 3.6 to require provision for sewage abatement even when a sewer line is being installed. Provision for sewage abatement is not necessarily the same as an on-site sewage disposal system and therefore is not prohibited by Policy 3.11.

While the Board believes Council could rely on Policy 3.6 to require sewage abatement, the Board recognizes that Policy 3.6 is not mandatory. While the Board feels that it would be wise to make provision for sewage abatement now given the eventual need for a sewage treatment system, the Board cannot find that Council's failure to mandate sewage abatement was inconsistent with the intent of the M.P.S.

With respect to Policy 8.4(c)(iv) the Board believes that this Policy can be read to include pollution of the Front and Back Harbour. The Policy, however, has to be read in light of the rest of the M.P.S. It is clear that the intent of the M.P.S. is to permit continued development despite the fact that development will worsen the existing pollution. The Town notes that the Departments of Environment and Health are prepared to permit further development so long as additional sewage outfalls are not required.

While the Board is sympathetic to the concerns of the Appellant and others about the sewage pollution in Lunenburg Harbour, the Board believes it does not have the authority in this case to prevent development given the wording of the M.P.S.

The policies which deal with architectural matters use the phrase "other buildings in the area". Area is not defined. If "area" means the immediate area then the proposed building is compatible with the Cornwallis Apartments, the duplex and the Kent Home. If "area" means Old Town, then it is necessary to review the various features of the building.

It is unfortunate that Professor Wanzall did not have an opportunity to review the detailed drawings and the evidence of Mr. Kaulback. In his testimony, Professor Wanzall stated that it is possible to design a multi-family building which would be consistent with the architecture of Old Town. He was concerned that the building would appear from the Bypass as an unbroken wall, unlike the typical view of narrow houses with spaces between them. He stressed the emphasis on doors and porches in Lunenburg. He also mentioned the detailing on buildings including cornerboards, skirting, and window treatment.

Mr. Kaulback testified that he tried to incorporate various design features to accommodate compatibility in appearance with the traditional buildings. He feels that the wooden balconies with gable roofs over each in the proposed building will break the effect of one large wall.

In his report, the Town Planner makes the following comments:

> "The architectural design of the building is one that respects the traditional characteristics of the existing built environment. The high pitched roofs, with dormers and window design reflect traditional design characteristics in the Town...(at page 2)...the architectural style of the building reflects many of

> the traditional characteristics of structures in the community....(at page 3)...the proposed structure is compatible with surrounding structures in terms of height, bulk and respects the traditional architectural characteristics of buildings in the Town of Lunenburg...(at page 4)."

The Board is satisfied that with respect to the architectural requirements the proposed agreement is reasonably consistent with the intent of the M.P.S.

In her evidence, Frances Knickle, the Appellant's daughter, raised the issue of Section 7 of the Canadian Charter of Rights and Freedoms which reads as follows:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Although the argument was not fully developed, the Board assumes that the life and security of the person is threatened by the increase in sewage pollution in the harbour and that Ms. Knickle and others will be deprived of those rights. Section 24(1) of the Charter is the enforcement provision. The section only comes into play once any such rights have been infringed or denied. Until there is an infringement of such rights, the Board cannot grant a remedy.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of April, A.D., 1989.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

BLOM AND FERGUSON v. **HALIFAX (CITY OF)**

PLANNING - L.U.B. AMENDMENT - DOWNZONING BLOCK FROM C-3 TO R-2.

This is an appeal from a decision of Halifax City Council which downzoned an area from C-3 to R-2. The Appellants each owned a lot in the area and were seeking to maintain c-3 Zone on their lots.

HELD: Appeal allowed. Council decision reversed.

Although Appellants only appealed the decision as it affected their lots Board reversed Council's total decision. Council's decision was inconsistent with the intent of the M.P.S. The fact that Council may consider existing M.P.S. obsolete cannot be a determinant in the appeal. Council may take into consideration the wishes of residents.

NSMB-31-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: A consolidated appeal under the Planning Act, S.N.S., 1983, c. 9, by **TONY R. BLOM, (M5 ADVERTISING LIMITED)** regarding 6129-31 North Street and **ROBERT S. FERGUSON (RAYMOND W. FERGUSON TRUST #4)** regarding 2609 Gladstone Street from a decision of the Council of the City of Halifax made the 1st day of December, 1988 and advertised on December 12, 1988, and rezoned certain lands on the north side of North Street between Gladstone Street and Clifton Street from C-3 (General Industrial) to R-2 (General Residential) excepting 6057-59 North Street and excepting 6053-55 North Street which were proposed to be rezoned to R-2 remaining C-2 (General Business).

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ERIN O'BRIEN EDMONDS, LL.B., on behalf of the Appellants, Tony R. Blom and M5 Advertising Limited,

ROBERT S. FERGUSON, on behalf of Raymond W. Ferguson Trust #4 and on his own behalf,

GERALD J. GONEAU, LL.B., on behalf of the City of Halifax;

HEARING DATES: March 6, 1989 and April 10, 1989.

DECISION RENDERED: April 28, 1989.

DECISION: Appeal Allowed.

DECISION

This is a consolidated appeal under the **Planning Act**, S.N.S., 1983, c. 9. Council rezoned land on North Street from

C-3 to R-2. The down-zoning complained of flowed from Council's perception of public demand. Council came to this perception by hearing views expressed at Public Hearings surrounding the Peninsula North Proposed Secondary Planning Strategy.

The Appellant, **RAYMOND W. FERGUSON TRUST #4** is the owner of a residential apartment dwelling at 2609 Gladstone Street, Halifax. The Appellant, **TONY R. BLOM**, is one of the owners of 6129-6131 North Street. He is joint owner of a commercial occupant of part of that building, **M5 ADVERTISING (N.S.) LIMITED.**

Raymond W. Ferguson Trust #4 filed a Notice of Appeal, dated December 30, 1988, with the Board on that date.

The Appellant, Tony R. Blom, filed a Notice of Appeal on behalf of himself and his co-owner, Terri L. Adams. It was a letter dated December 30, 1988, filed with the Board on January 3, 1989.

Both Notices appealed Halifax City Council's decision in a general rezoning matter made December 1, 1988, and advertised on December 12, 1988. This decision rezoned a block north of North Street from C-3 (General Industrial) to R-2 (General Residential). Blom/Adams and Ferguson only appealed a portion of the rezoning, namely the specific property that each owned within that general area.

The City, as set out in the Minutes of City Council of August 25, 1988, had rezoned the land described in the following quotation:

> "It was subsequently moved by Alderman Meagher, seconded by Alderman Crowell, that City Council set the dates for public hearings to consider the following: ...(2) the rezoning of land zoned C-3 (Industrial) Zone and C-2 (General Business) Zone and fronting on the north side of North Street between Gladstone and King Street, excepting 601 North Street (Hertz Rent-A-Car) and 6103 North Street (Linda's Grocery), from C-3 (Industrial) Zone and C-2 (General Business) Zone to R-2 (General Residential) Zone..."

The present Appellants object only to the rezoning of their own respective lots. These lie on the north side of North Street between Gladstone and Clifton. They have expressed no concern about the land lying north of North Street between King and Clifton.

On December 1, 1988, Council passed the following Motion:

> "Moved by Alderman Meagher, seconded by Alderman Flinn that Council rezone from C-3 (Industrial) to R-2 (General Residential) the properties in the area of the north side of North Street between Gladstone Avenue and Clifton Street as identified in the Staff Report of 31st August, 1988, illustrated on the map attached to that report: Further that Civic No. 6057-59 North Street and 6053-55 North Street (originally proposed to be rezoned from C-2 (General Business) and R-2 (General Residential) be excluded."

Council did not distinguish between the two sets of properties recommended other than as expressed in this Minute.

North Street is a heavily travelled street in Halifax. It feeds vehicular traffic for the Angus L. MacDonald Bridge to and from Dartmouth. On the north side of North Street there is some mixture of residential and commercial development near the subject property. The two block area in question contains somewhat mixed uses.

Under Section 16(1) Chapter 9, S.N.S. 1981, **The Municipal Board Act**, the Chairman assigned Board Member, Richard L. Weldon, to determine this appeal.

The Board heard this appeal at its 10:00 a.m. sittings on March 7, 1989, at suite 708, Royal Bank Building, 5161 George Street, Halifax, Nova Scotia. On request of the parties, it immediately adjourned to April 10, 1989 at the same hour and place. After the evidentiary portion of the hearing, the Board heard argument from all parties. It adjourned to view the site, reserving its decision.

The City took no objection to the jurisdiction of the Board. Counsel for the Appellants Tony R. Blom and Terri L. Adams satisfied the Board on all jurisdictional matters. The Board therefore took jurisdiction to hear the Appeal.

Counsel for the Appellants Tony R. Blom and Terri L. Adams called Ronald Hansen, Patrick Pottie and Walter Fitzgerald, William Campbell and Terri Adams. Robert Ferguson spoke on behalf of the Appellant, Raymond W. Ferguson Trust #4. Counsel for the City called Michael Cregan and Nicholas Meagher.

Aldermen Ronald Hansen, Patrick Pottie and Walter Fitzgerald testified that they had voted on this rezoning motion in confusion. They knew that the Appellants had requested rezoning exemption for the appealed properties. The motion to rezone contained exemptions. All these aldermen said that they thought the exclusions included the appealed properties although, in fact, they did not.

Alderman Meagher testified for the City. He conceded these aldermen might have been confused but that they had a duty to inform themselves before voting on any resolution. He said if they were confused prior to a vote they should insist that the City Clerk explain the motion.

Ms. O'Brien Edmonds called the three aldermen to support her position that their confusion on voting constituted unusual or exceptional circumstances. She argued these circumstances allowed her to invoke Section 63(7) of the **Planning Act** in support of her appeal. During subsequent argument, she conceded that Section 63(7) had no application since her Appellants were not applicants. She did, however, point out that the confusion expressed by these three aldermen related to the issue here. That issue is whether or not the decision of Council was reasonably within the intent of the M.P.S.

Mr. William Campbell, a Senior Planner for the City, helped produce the planning report before Council. The report contained in Exhibit F-7, page 11, dated August 31, 1988, says, in part:

> "SUBJECT: Rezoning from C-3 and C-2 to R-2: area on the north side of North Street between Gladstone Street and King Street (Case No. 5705)
>
> ...The proposed rezoning for this area is identical to that approved by Council through the Peninsula North area plan. An Information Report, dated August 23, explained that this plan, which was approved by Council on May 24, has yet to be approved by the Minister of Municipal Affairs. The 120 day moratorium initiated on advertising the notice of intention to adopt the

area plan has expired. This somewhat extraordinary procedure of proceeding with a rezoning has initiated another 120 day moratorium effective on the date of the new advertisement (August 29).

Discussion

The area that is zoned C-3, located between Gladstone and Clifton Streets, is predominantly residential in character. This area is designated "Industrial" on the future land use map. There are a variety of residential types, ranging from single detached homes to apartment buildings. There are no commercial uses in this area at the present time, except for a small neighbourhood grocery store located at the corner of Clifton and North Streets (Linda's Grocery); ...

Plan Policy

Since there are two future land use designations that cover this area, "Industrial" and "Commercial", Council should have regard to the Industrial and the Commercial Facilities policies of Part II, Section II of the Plan.

The industrial policies apply to the area between Gladstone and Clifton Streets. Policies 4.2 and 4.2.1 support the Industrial designation of this area, and discourage the promotion of land uses that would conflict with industrial use. Policy 4.2 notes that "...industrial (designated) areas should be separated and buffered from residential areas and shall be located on or adjacent to the principal street network." North Street has been accepted as a principal street, as illustrated on Map 8 of the Plan. Policy 4.2.1 states that, "the City should encourage the maximum use by industry and supporting uses of lands designated for industrial development and should, where possible, discourage the development of conflicting land uses on these lands in recognition of the limited supply of this type of land within the City...".

...

Conclusion

Policies in the Municipal Development Plan clearly establish the properties between Gladstone Street and Clifton Street as industrial and discourage the development of land uses that would conflict with industrial uses. Rezoning to R-2 is contrary to the intention of these policies.

> ...
>
> Council has however, in other situations, rezoned properties from the designated use to their existing use (for example, rezoning residential properties to "residential" from "commercial" in an area that has been designated as "commercial" for future land use). There is clear policy direction in the Plan for Council to do this; specifically, Council has followed Policy 2.5.4 of the Residential Environments policies, contained in the City Wide Objectives section of the Plan. This policy allows rezoning to existing use on the condition that it take place in "soft areas" that are outside of areas designated for detailed planning. This rezoning is, however, within the Peninsula North planning boundaries where the detailed area planning process is intended to be the method by which future land use and zoning is resolved. There is no specific policy support in the Plan for Council to rezone to existing use, particularly when the zoning is not consistent with the future land use designation, in areas identified for detailed planning.
>
> The area under consideration is, however, adjacent to a residentially designated neighbourhood to the south of North Street (the subject of another rezoning to R-2-Case Number 5704). On the basis of adjacency Council can consider the rezoning. However, it is staff's opinion that, the weight of plan policy is more in support of the existing industrial and commercial zoning than the proposed R-2 Zone."

There was no expert planning evidence contrary to this report of the planner.

The Board has perused the entire M.P.S. and L.U.B. That perusal and the evidence before the Board shows that the planner's report is correct. It is clear from the evidence of at least three aldermen that they materially misunderstood the motion now questioned. All four aldermen testifying said they voted to support people's requests to rezone from Commercial to Residential despite the Industrial designation. They all wished to rezone to the prevailing use.

According to the Planner's report this is an area where the detailed area planning process "...is no specific policy support for council to rezone to existing use." Further, the Planner reports "...rezoning to R-2 is contrary to the intention of these policies." Uncontroverted planning evidence and a perusal of the M.P.S., shows Council's decision was not reasonably within the intent of the M.P.S.

The Board looks to Sections 63(3) and 63(5) of the **Planning Act.** The Board must allow the appeal because the decision of Council does not reasonably carry out the intent of the M.P.S.

Counsel for the City has cited a decision of the Board (Salton, Vice-Chairman), Astro Management Ltd. v. City of Halifax, 1986 MBD, Vol. 5-B, at page 387, (leave to appeal refused by the unreported decision of Macdonald, J.A., December 3, 1986, S.C.A. 01708). Counsel argued that decision supported City Council taking cognizance of citizens' objections to the present zoning and their demand to rezone. The headnote states the principle that he wished to cite, at page 387:

> "The concerns of their residents are a valid matter for Council's consideration."

Council may take into consideration the wishes of residents to the extent that Council can ascertain such wishes. Such wishes are a valid matter of consideration.

Astro Management's headnote also states:

> "The possible eminent [sic] approval of a draft secondary planning strategy. This was an invalid element in Council's consideration. The Applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self evident."

The report alluded to the proposed Peninsula North Secondary Planning Strategy ("PNSPS") which has been a long time in the making. As far as concerned it, City Council brought PNSPS to fruition on May 24, 1988. In the Board's (Garber, Vice-Chairman) unreported decision (Ethel M. Brown, NSMB-13-88-P of January 24, 1989) the draft PNSPS surfaced. At page 2 of this decision, the Board said:

> "While considering the proposal, Council was also considering the adoption of the Peninsula North Secondary Planning Strategy ("PNSPS"). Council later adopted the PNSPS but it did not receive Ministerial approval. [The Board hearing was adjourned pending a Court review of the Minister's refusal. The City was unsuccessful in overturning the Minister's decision].
>
> In making its decision, Council looked at both the existing Land Use By-law and the one proposed under the PNSPS."

The Board made no further comment in the Brown decision how Council or the Board should regard the proposed PNSPS.

Nathanson J. conducted the Court review of the Minister's refusal referred to in Brown. His decision appears in City of Halifax v. The Attorney General of Nova Scotia (1988) S.H. No. 66314 (unreported) [alluded to in Nova Scotia Law News Vol. 15 No. 3, page 38].

Counsel for the City informed the Board there was no appeal pending from Mr. Justice Nathanson's decision. Counsel said that no other City of Halifax PNSPS's have yet been put before the Council or the Minister.

Nathanson J.'s decision makes it very clear the Board should give small consideration to the proposed City of Halifax PNSPS. The Court supported the Minister's refusal to approve the draft PNSPS. This Board therefore follows the principal extracted from Astro Management. Imminent approval of a draft Secondary Planning Strategy is not a sound legal base for the Council's consideration. "The Applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self-evident". An aggreived person has the same right as an applicant to have the current law applied.

The only concern remaining to the Board is the proper disposition of this invalid rezoning decision of Council. The Board has no mandate in this case to apply Section 63(4)(a) of the **Planning Act**. The Board cannot confirm Council's decision since Council's decision receives no support within the intent of the M.P.S.

The City argued that the subject land was adjacent to a compatible zone on the south side of North Street. That compatible zone, said the City, would permit the proposed rezoning. The Appellants argued North Street was a definitive boundary between the residential south side and the industrial north side of North Street. The City planner balanced the internal policies of the M.P.S. He formed the opinion that balance of policies put the proposed rezoning outside the intent of the M.P.S. His report shows this reasoning. The Board agrees with it.

The Board under Section 63(4)(b) could technically allow the appeal by reversing Council's decision amending the Land Use By-law.

Alternately, under Section 63(4)(c), it could technically allow the appeal by instructing Council to amend the By-law in a manner prescribed by the Board.

Counsel for the City has argued most eloquently that the Board, at most, should only grant the relief sought by the Appellants. The Board concedes that it has the technical power to do that under Section 64(4)(c) alluded to above. For the Board to do so however, would, in effect, confirm the rest of the decision of Council. The totality of Council's decision is outside the intent of the M.P.S. It is in direct contradiction with the intent of the M.P.S. (Council's planners told Council that in advance of its decision.) It is the decision of Council that the appeal has brought under scrutiny before the Board. The Board has no desire to confirm that decision in any respect.

The Board, therefore, feels it can only allow that one appropriate remedy, the reversal of Council's decision under Section 63(4)(b). The Board allows the appeal and reverses the decision of Council amending the Land Use By-law.

The real issue in this case (with which the Board cannot deal) is that the particular Industrial Designation under

G.FLUM in the existing M.P.S. (in effect preserved by Nathanson J's decision.) is obsolete in the view of City Council. City Council's proposed PNSPS deals with this obsolescence and proposes a solution satisfactory to Council. For the City's view to prevail it must get the Minister to agree that this proposed Planning Strategy is satisfactory. It has not yet been able to do so.

The Board must determine the intent of the existing M.P.S. The intent is clearly and properly set out in the quoted Report of the planners, earlier in this decision. Although City Council may consider the existing M.P.S. obsolete, that fact cannot be a determinant to the outcome of this particular appeal.

Therefore, pursuant to Section 63(4)(b) of the **Planning Act** the Board will allow the appeal. It reverses the decision of Council made December 1, 1988, advertised December 12, 1988, and complained of in this appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of April, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

GRADY ET AL v. HALIFAX COUNTY and ATLANTIC NURSERIES LTD.

PLANNING - REZONING R-1 TO C-1 - BEST INTERESTS - GARDEN CENTRE-ENVIRONMENT CONCERNS - PLANNING ACT, S. 63(4)(c), 74(2), 11b; HALIFAX COUNTY ZONING BY-LAW 24; HALIFAX DARTMOUTH REGIONAL DEVELOPMENT PLAN.

Halifax County rezoned R-1 land in Lawrencetown on Cole Harbour to permit a garden centre. Residents appealed on basis of potential harm to environment particularly the waters of Cole Harbour. Long history of planning in the area but no M.P.S. in effect. Under By-law, 8-foot setback from water is minimum requirement but under adjacent M.P.S. setback ranges from 30 to 200 feet. All experts agreed 8-foot setback was insufficient.

HELD: Appeal allowed.

Council's decision to rezone to C-1 without a buffer zone from the shoreline is inconsistent with the best interests of the Municipality. The Board heard evidence that was not before Council. Board not prepared to use s. 63(4)(c) to amend Council's decision.

The Board normally would not consider the M.P.S. for another area but here the area is adjacent and borders the waters of Cole Harbour. From a pollution protection point of view there is no valid distinction between the subject land as it borders Cole Harbour and the lands in the adjacent M.P.S.

NSMB-12-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, by **DONALD GRADY, DONNA LASSALINE, CAROL O'NEIL and JAMES REID** from a decision of the **Council of the Municipality of Halifax** which decision rezoned lands in Lawrencetown from R-1 (Single Family Dwelling) Zone to C-1 (Local Business) Zone on the application of **ATLANTIC NURSERIES LIMITED.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DONALD GRADY, DONNA LASSALINE, CAROL O'NEIL and JAMES REID, Appellants, on their own behalf;

GEORGE COOPER, Q.C., ERIC LEDREW, LL.B., and HARVEY MORRISON, LL.B., on behalf of Atlantic Nurseries Limited;

ROBERT CRAGG, LL.B., on behalf of the Municipality of the County of Halifax.

HEARING DATES: September 20th and 21st, 1988;
October 26th, and 27th, 1988;
November 23rd, 1988;
December 6th, 19th and 20th, 1988.

BRIEFS SUBMITTED: January 30th and March 10th, 1989, for the Appellants;
February 24, 1989 for the Applicant;
March 8, 1989 for the Municipality.

DECISION DATE: May 15, 1989.

DECISION: Appeal allowed.

DECISION

Atlantic Nurseries Limited applied to the Council of the Municipality of the County of Halifax to rezone land in Lawrencetown from R-1 (Single Family Dwelling) Zone to C-1 (Local Business) Zone to permit the development of a retail garden centre. The subject property is located near the intersection of Cole Harbour Road, Ross Road and Lawrencetown Road (Highway 207). The land is immediately east of the Little Salmon River and is bounded on the south by the waters of Cole Harbour. The site is low lying. The area is approximately 81,300 square feet. The surrounding area is zoned residential or parkland.

The Appellants are all residents in the Lawrencetown area. They are opposed to the rezoning and to the proposed retail garden centre for the following reasons as summarized from the Notice of Appeal:

1. the uses allowed under the proposed zone are not compatible with the existing residential neighbourhood;
2. the proposed rezoning which permits C-1 uses will increase the risk of contamination of the environment, ground water, well water, river and estuarian waters in the area;
3. the decision is inconsistent with the best interests of the municipality as expressed in the Halifax-Dartmouth Regional Development Plan, the Porter Plan, the Revised Porter Plan, the Lawrencetown Proposal, the M.P.S. for Cole Harbour/Westphal and the draft M.P.S. for Lawrencetown;
4. the proposed use will cause a heavy and

potentially hazardous impact of traffic on the neighbourhood.

There were originally 8 Appellants. At the commencement of the hearing Atlantic Nurseries Ltd. questioned whether the Appellants were aggrieved persons within the meaning of Section 63(1A) of the **Planning Act**. Four of the Appellants were not present. The Board found those absent not to be aggrieved persons.

The Board took 8 days between mid-September and mid-December, 1988 to hear this appeal. The parties filed final briefs between January 30, 1989 and March 10, 1989.

No one introduced into evidence any plans or sketches of the proposed garden centre. Mrs. Godfrey, the Secretary-Treasurer of Atlantic Nurseries Ltd., described the proposed development as follows:

> "So essentially we saw a main frame building which could consist of an area of anywhere between 3 and 4,000 square feet, a greenhouse, glass greenhouse that could encompass something in the order of 2 to 3,000 square feet, a lath house that could, and in all probability would, encompass something in the order of 10,000 square feet...this will be strictly a garden centre with all the features that is necessary for a retail garden centre...
>
> The main building would be the main store, which would probably house the hard goods, a gift shop and a florist shop, ...and possibly a small office in the back..."

She said the proposed development contains parking space for 50 cars. She also said Atlantic Nurseries Ltd. is considering building boardwalks along the shoreline.

There is no Municipal Planning Strategy ("M.P.S.") in effect in the Lawrencetown area of the Municipality. Section 112 of the **Planning Act** has been complied with and the Zoning By-law remains in force. Under section 63(6) of the **Planning Act**, the Board may not interfere with a decision of Council made under a Zoning By-law unless it is inconsistent with or unnecessary for the protection of the best interests of the municipality.

During the hearing, the Board discovered there was a long history of planning and public action in Lawrencetown. As a result of this, the Board required further evidence respecting the various Government plans and documents which impact on the Lawrencetown area. Council did not receive a historical overview of these documents when it made its decision. This may be in part because the Planner assigned to this case is a newcomer to the County and in part, because the Provincial Government appears to have proceeded with planning initiatives in the area without effectively involving the Municipality at all stages.

The Board called Jack Leedham, an employee with the Department of Municipal Affairs to testify. Over the years Mr. Leedham's duties included responsibility for the administration of the Halifax - Dartmouth Regional Development Plan ("Regional Development Plan"). Mr. Leedham reviewed the history of the Regional Development Plan and subsequent documents, the Porter Plan, the Recommendations of Porter Plan Advisory Committee and the Lawrencetown Proposal.

The Provincial Government approved the Regional

Development Plan in 1975. Among other recommendations, the Regional Development Plan contained 7 regional park designations, including the Cole Harbour/Lawrencetown Regional Park.

Exhibit G-18 shows the lands designated Regional Park in 1975. The designation included privately owned lands not being used as parkland. The Cole Harbour/Lawrencetown Regional Park designation included the subject property.

The Regional Development Plan contains provisions for the Government to acquire, develop and maintain the land designated for the regional parks. The Governor in Council has power to vary or alter the area to which the Regional Development Plan applies. [**Planning Act**, section 111(3).]

The residents of Lawrencetown and Cole Harbour had serious concerns about the proposed Cole Harbour/Lawrencetown Regional Development Park. The Province appointed Hector Porter to review the Plan in light of these concerns. Mr. Porter prepared a new plan known as the Porter Plan.

The Porter Plan also met with opposition from the residents. The Province then appointed the Porter Plan Advisory Committee to review the Porter Plan and make further recommendations. The Committee issued the Revised Porter Plan.

The residents of Cole Harbour were apparently satisfied with the recommendations of the Porter Plan Advisory Committee. The Municipality developed a M.P.S. for Cole Harbour/Westphal.

Lawrencetown residents were not satisfied with the recommendations of the Porter Plan Advisory Committee. The Province negotiated with the Lawrencetown Citizens Committee. A document entitled the Lawrencetown Proposal was prepared. This proposal was voted on by the residents on March 8, 1980. The proposal received overwhelming approval.

Exhibit G-26 is a summary of the Technical Report of the Porter Plan Advisory Committee. It includes a copy of the Porter Plan map and the Revised Porter Plan map. On both these maps, the subject property is shown as being part of a Zone C. Both Plans similarly define this zone. The Plans demonstrate a clear intention that the lands in Zone C will remain in private hands with strict controls on development.

Exhibit G-24 is a copy of the Lawrencetown Proposal including a map. The Lawrencetown Proposal is divided into 2 phases. The first phase deals with lands to be acquired by the Province. The map shows the lands to be acquired by the Province. The subject property is not included in the lands which are to be acquired by the Province. Unlike the Porter Plan and the Revised Porter Plan, the Lawrencetown Proposal contains no provisions which restrict the use of lands left in private hands.

Phase 2 of the Lawrencetown Proposal deals with the Development of Land Use Regulations for Lawrencetown. Section 3 reads as follows:

> "3. Guidelines for Phase Two (Development of Land Use Regulations for Lawrencetown).
>
> Owing to this issue's complexity, the strong emotions

it evokes, and the necessity to involve Municipality of the County of Halifax officials in its successful resolutions, it is felt that discussions should occur between the LCC [Lawrencetown Citizens Committee] and the relevant Provincial and County officials (e.g. Department of Municipal Affairs and County Planning Department) to work towards an acceptable and effective set of regulations for Lawrencetown. The LCC will have the authority and scope to utilize whatever resource and technical persons it deems necessary. These discussions will designate and boundary and draft a set of proposed regulations designed to protect the wetlands and watercourses of Lawrencetown and to prevent large-scale high density, residential development of the Colby Village-Forest Hills model, as well as appropriate regulation of commercial activity. This set of regulations will be designed to achieve community goals and objections.

As with Phase One, the residents and landowners of Lawrencetown will be afforded the opportunity of assessing the results of the discussions. It will be requested of the appropriate authority that no regulations be adopted by any authority without community approval. The committee shall file its report six months from the date the province announces that Phase One has been adopted and will be implemented. The results of Phase Two will be made public with ample time for community assessment prior to the submission to the residents and landowners at a public meeting called for this purpose.

The Province commits itself to ensuring effective participation of elected and accountable community representatives in planning and development issues. It is felt this objective can be most appropriately achieved through the activities of the LCC and without the creation of any special commission for the Lawrencetown area.

Phase Two

The Preparation of a community development plan with accompanying by-laws and regulations within a Lawrencetown boundary in accordance with the guidelines adopted in Phase One.

At the time of acceptance by the community, such regulation will be implemented by the appropriate authority and shall replace the MAPC designation for Lawrencetown and any other planning regulations in effect at that time."

Although the Lawrencetown Proposal was approved by the residents in 1980, the subject property remained within the Cole Harbour/Lawrencetown Regional Park Designation until 1983. By Order-in-Council 83-474, the Provincial Government changed the designation of the subject property and adjacent land from Regional Park to undesignated lands outside the development boundary. The Order-in-Council, as is normal, does not include background information and does not cite reasons. (Mr. Grady maintains that the Lawrencetown residents were not aware of the O.I.C. until 2 years later.)

It should be noted that throughout this period, the subject property retained its R-1 zoning under the Municipality's Zoning By-law.

Mr. Leedham, on being asked about the reasons for the removal of these lands from the Regional Park Designation, made the following responses:

> "A. I would say that that was a good component of the ultimate decision was the Porter Plan, the revised Porter Plan and the Lawrencetown Proposal.
>
> Q. Were there any other factors that would have been taken into account?
>
> A. I think ultimately trying to determine what type of park we wanted in the area. There were other factors that went into ultimately deciding on those boundaries, and that is still evolving too to some extent.

[And further on speaking about the subject property].

> Q. Do you have knowledge, any specific knowledge of why that piece of land would have been taken out?

> A. I suppose there are two significant factors, one was trying to rationalize the boundaries of that regional park designation, and we had a lot of property designated regional park and we had, better think about this one for a second if you will. I think that the first factor is that we had certain lands already designated park and institutional by the County of Halifax in the particular area that we were studying and I believe that these lands were designated park and institutional, I think that would have been one of our factors. Secondly...
>
> Q. The Municipality had designated them park and institutional?
>
> A. I believe so, yes. I think the County had park and institutional zoning here from Lawlor's Point and coming down here to Blindfold, and so that would have been one of the factors, the other factor is that we just didn't have much support within the community for the designation. Now whether the community's position was that it wasn't necessary to be designated because it was already park and institutional zoning I have no idea, we didn't get much support for leaving that designation on that property within the community."

Mr. Leedham's testimony implied that the lands which were removed from the Regional Park Designation by O.I.C. 83-474, (including the subject property), received protection by the existing zoning. In addition before any one can develop the land, he needs a Regional Development Permit. This permit must be obtained from the Provincial Director of Planning employed by the Department of Municipal Affairs.

Included in Exhibit G-7 was a copy of a letter dated December 15, 1988 from Paul Christian of the Department of Municipal Affairs. The letter is addressed to Paul Morgan, County Planner, and states in part:

> "...the lot in question appears to be eligible for the issuance of a Regional Development Permit subject to compliance with all other municipal and provincial

statutory requirements."

Mr. Leedham testified that this letter did not mean that a permit would automatically be issued. He said there were a number of criteria that had to be considered and that Mr. Christian would not have undertaken a review of the criteria at this stage. Mr. Leedham noted that the Department of Lands and Forests would probably be contacted since it is responsible for the management of the adjacent Regional Park lands. Mr. Leedham said environmental concerns are included in the criteria. Mr. Leedham did not comment on whether or not he felt that a regional development permit should be issued.

Section 110 of the **Planning Act** provides that both the granting and refusing of a regional development permit are subject to appeal to the Board.

Mr. Leedham stated, in his opinion, the Lawrencetown Proposal was now a historical document and treated as such. Mr. Leedham said he believed the Lawrencetown Proposal was not a legal document, only a political document.

Given that the residents of Lawrencetown voted overwhelmingly in support of the Lawrencetown Proposal and given the ongoing process to develop a M.P.S. and Land Use By-law ("L.U.B.") for the area, the Board cannot disregard the Lawrencetown Proposal when determining the bests interests of the municipality.

Mr. Grady argued that the Lawrencetown Proposal was a M.P.S. for Lawrencetown. The Board dismisses this suggestion as the document has none of the features of a M.P.S. It does not have the necessary Council or Ministerial approval to constitiute an M.P.S. It is, however,relevant to the appeal of the current rezoning. The Lawrencetown Proposal states that:

> "It will be requested of the appropriate authority that no regulations be adopted by any authority without community approval".

And further:

> "At the time of acceptance by the community, such regulations [community development plan] will be implemented by the appropriate authority and shall replace the MAPC designation for Lawrencetown and any other planning regulations in effect at that time".

Do these two statements mean that the County of Halifax may not amend the existing Zoning By-law without community approval? The Lawrencetown Proposal does not purport to override the **Planning Act**. Amendments to a zoning by-law require a public hearing which may provide a form of community approval. The Municipality was not a party to the Lawrencetown Proposal. The Appellants introduced letters as exhibits which showed that members of the Provincial Government fromm time to time drew Council's attention to the Lawrencetown Proposal.

The Minutes of Council's Public Hearing contain no reference to the Lawrencetown Proposal. There was some discussion that the subject property was not included in the lands acquired by the Province. The Minutes do not show that Council was made aware that the property was originally within the Regional Park designation.

In the Board's opinion, the Lawrencetown Proposal, as a relevant planning document, should have been brought to Council's attention at the time of the decision to rezone.

The Appellants introduced a draft copy of the proposed M.P.S. for Lawrencetown. It is dated October, 1988. The content of this draft has changed from the draft which was available at the time of the Public Hearing. The Minutes of the Public Hearing show that there was some discussion of the draft M.P.S. as follows:

> "Deputy Warden MacDonald inquired about the recommendation for this property if this application is not approved. Mr. Grady advised it is not designated R-1 in the proposed plan, although this has not been seriously reviewed yet. He noted in the proposed draft plan there is an RR-1 designation which is sensitive to the history of Lawrencetown and to the need to have planning in the community to have home businesses and to use proeprties as traditional in this area. It will also involve a zone that will preclude Mr. and Mrs. Godfrey from locating their business on this land unless they go through an additional evaluation and analysis program. He noted this RR-1 zone is more flexible than the R-1 designation in other jurisdictions, but not flexible enough to permit this type of use. This type of use is proposed to be allowed in the part of the Lawrencetown which is away from the water...
>
> Councillor Randall inquired about the proposed RR-1 zone, and if it would allow a garden centre under a development agreement. Mr. Grady advised this is not known yet because the people are not sure what they want to do with garden centres. There is no definition for a garden centre, and a proposal for the terms of development agreements have not yet been prepared, so it cannot yet be determined if development agreements will apply to garden centres. He noted Policy 50 in the draft plan is a requirement that an intensive evaluation of the land capability and proximity of water be made, as well as the topography of land which might be involved in this process. He clarified that the community has never voted on garden centres or development agreements for garden centre."

At the Board hearing, the Appellants argued that the draft M.P.S. prohibited a garden centre on the subject property. In the Board's opinion, if any draft M.P.S. is to be considered, it should be the draft which was current at the time of the Public Hearing. The Minutes cited above indicate that Mr. Grady advised Council that the draft M.P.S. did not expressly prohibit a garden centre on the subject property.

Ms. Valerie Spencer, Director of Planning and Development for the County, said she contacted the planner who was working on the draft M.P.S. at the time of the rezoning. It was her understanding there might be a provision for development agreements for certain uses including garden centres at the subject property.

Based on the Minutes of the Public Hearing and the evidence of Valerie Spencer, the Board is satisfied that when Council made its decision on the rezoning the draft M.P.S. did not exclude a garden centre on the subject property.

The Appellants also relied upon the M.P.S. for Cole Harbour/Westphal. The area included in this M.P.S. is adjacent to the subject property and some of the lands border the waters of Cole Harbour. While the Board normally would not consider the M.P.S. for another area, in this case the Board considers it relevant. Similar issues to those experienced in Lawrencetown arose in the Cole Harbour/Westphal area.

The Cole Harbour/Westphal M.P.S. makes specific reference to the Porter Plan and Revised Porter Plan. It notes that development in areas not contained within the Regional Park Designation "may have negative environmental and aesthetic effects upon the sensitive Cole Harbour salt marsh". The M.P.S. established a Special Area Designation for these lands. Policy P-72 states as follows:

> "Notwithstanding that they are not permitted within the Special Area Designation, Council may consider the development of new residential and agricultural uses on Long Hill according to the provisions of Section 33(2)(b) and 34 of the Planning Act. In considering such developments, Council shall require that developments be more than two hundred (200) feet from the shore of Cole Harbour and shall have regard to the provisions of Policy P-93 and to any negative effects which the development may have upon the sensitive environment of the area, the views to Cole Harbour or the future development of the regional park."

The Cole Harbour/Westphal L.U.B implemented Policy P-72 as the R-8 (Special Area) Zone. This Zone requires a minimum setback from Cole Harbour of 200 feet.

The Board has reviewed the zoning maps included in the Cole Harbour-Westphal L.U.B. All the lands under the L.U.B. which are bounded by the waters of Cole Harbour fall within one of the following zones:

R-1 (Single Unit Dwelling) Zone

R-8 (Special Area) Zone

P-2 (Community Facility) Zone

P-3 (Regional Park) Zone.

Except for the P-3 Zone, all these zones are also subject to the requirements of the P-1 (Open Space) Zone for community uses.

None of these Zones permit commercial uses other than those associated with a dwelling. The P-1 Zone requires a minimum 30-foot rear yard. The P-2 Zone rear yard is dependent on the height of the building while the R-1 and P-3 Zones require 8 feet. The P-3 Zone also requires a Regional Development Permit. As noted above the R-8 Zone requires a 200 foot setback.

Zoning By-law 24 which applies to the subject property only requires a minimum 8-foot rear yard. Council discussed the possibility of imposing certain restrictions on this rezoning. At the time Council felt this legally impossible.

During the hearing, the Board asked whether the parties would be agreeable to the Board amending Council's decision by rezoning a 25 to 50-foot strip around Cole Harbour to parkland. After reviewing sections 74(2) and 113 of the **Planning Act**, the Board determined that Council could designate the land as parkland without incurring any financial liability to the owner.

The Board asked the parties to consider the proposal and determine if the proposal might resolve the appeal. The Board did not instruct the parties to meet as a group, however, on the suggestion of Mr. Cragg, they did meet. Mr. Grady, in the Appellants' rebuttal brief, alleges that various statements were made by counsel during this meeting. The Board considers that this discussion, being negotiations between the parties with a view to settlement, was without prejudice. The Board will not consider the comments alleged, which, in any event, are denied by counsel.

Mr. LeDrew on behalf of Atlantic Nurseries, advised the Board that his client would not object to the proposed amendment. Mr. Cragg advised that County staff agreed with the idea. Council, however, had not had an opportunity to consider it. Mr. Grady advised that the proposal was not acceptable to the Appellants. They remained opposed to the rezoning of the land.

The Appellants indicated that they planned to call Dr. J.G. Ogden III as an expert witness. He was unable to testify on the first two days of the hearing. It was agreed that his evidence would be heard on November 23, 1988.

The Appellants, early in the proceedings, introduced a copy of a report which was referred to throughout the hearing as the Ogden Report. This report detailed the findings of a study of Cole Harbour and is entitled "Report of an Investigation to Assess Effects of Existing and Potential Sources of Pollution". It is dated January, 1971 and was prepared for the Task Group on Water Supply and Waste Disposal, Metropolitan Area Planning Committee. The purpose of the study was to assess the present condition of Cole Harbour and to determine the effects that might result from the discharge of additional quantities of treated sewage into Cole Harbour. One of the authors of this report was Dr. Ogden.

From the point of view of this appeal, the first conclusion of the Ogden Report is relevent:

> "1. Sluggish flushing action of Cole Harbour... indicates that several tidal cycles are required for substances to be cleared from Cole Harbour."

The evidence of Heath Stone, an expert in estuarine ecology is that this problem still exists although it may not be to the same extent as in 1971.

This evidence is relevant to the risk of an accidental spill of pesticides, fertilizers and herbicides into Cole Harbour from a garden centre such as proposed. The evidence bears on how long it would take to flush such substances from the harbour. The Appellants argue that substanial damage could be done in Cole Harbour before such contamination would be flushed out.

On November 23, 1988, Mr. Grady advised the Board that Dr. Ogden was unwilling to attend the hearing. Mr. Grady suggested that Dr. Ogden was objecting to being cross-examined by the Applicants' solicitors. Mr. Grady alleged that there had been improprieties by these solicitors. At that time, Mr. LeDrew introduced an Affidavit of Dr. Ogden which had been signed on October 25, 1989.

Mr. LeDrew took steps to solicit a second affidavit in light of Mr. Grady's allegations. On December 6, 1989 Mr. LeDrew introduced the second affidavit. This affidavit was signed according to the oral evidence on December 5, 1988. The actual affidavit, Exhibit G-35, is not dated.

While both affidavits were prepared by Mr. LeDrew, the second one was sworn to by David Farrar who is associated with another law firm. Mr. Farrar reviewed the affidavit with Dr. Ogden before Dr. Ogden signed it. (A preferrable practice might have been for Mr. Farrar to interview Dr. Ogden and then prepare an affidavit.)

On December 20, 1988, the Appellant introduced a letter from Dr. Ogden which was dated September 19, 1988 and was addressed to the Board.

Dr. Ogden's letter of September 19, 1988, (Exhibit G-39) states as follows:

> "In my own considered view, the addition of potential sources of chemical and nutrient contamination represented by a rezoning which would permit Atlantic Gardens Ltd. to operate in the near environment of Cole Harbour is highly inadvisable."

The two affidavits present an entirely different conclusion. The October 25, 1988, affidavit states that Dr. Ogden has spoken to Dr. Waugh of the Department of Environment and that:

> "...he has informed me of the nature of the garden centre to be constructed at Upper Lawrencetown, Halifax County and its operations. I agree with Dr. Waugh that the proposed garden centre does not pose a threat to the environment or surrounding area and I do not have any reservations regarding the siting of and operation of the garden centre."

The second affidavit states that the problems identified in the 1971 Report "have long since been cleared up".

The contrast between the letter and the two affidavits shows why we feel cross-examination is a necessary part of our legal process.

The Board has reviewed the letter and both affidavits. The letter and the affidavits reach opposite conclusions. The letter was written by Dr. Ogden whereas the affidavits were drafted by another and signed by Dr. Ogden. Without the benefit of cross-examination the Board is unable to determine whether the letter or the affidavits represent the true position of Dr. Ogden in this matter. In view of this uncertainty, the Board can give no weight to the letter and affidavits.

Atlantic Nurseries Ltd. called Dr. Donald Waugh who is Chief of the Environmental Development Section of the Provincial Department of Environment. He was qualified as an expert to give opinion evidence with respect to pesticides in the environment and the regulatory scheme of pesticide control.

Dr. Waugh at Council's request attended the Council meeting on April 19, 1989. Before his attendance at Council he consulted Mrs. Godfrey. He visited the two premises which Atlantic Nurseries Ltd. operates. He based his evidence to the Board on the amount of pesticide which Atlantic Nurseries Ltd. anticipated would be used at the proposed site in Lawrencetown. The estimated amount is 1 1/2 to 2 pounds.

Dr. Waugh was asked at the hearing about the environmental risk of the proposed garden centre. His answer was in relation to the use of the estimated 1 1/2 to 2 pounds of pesticide and was as follows:

> "The environmental risk, I don't think there is an environmental risk associated with this unless one gets to the point of also saying that a truck which drives on the highway and crosses a bridge and has some pesticide in the back of it is an equal risk. The risk level associated with an operation like this on the ecology of Cole Harbour - I can't really say anything other than I don't think it's going to exist."

On cross-examination Dr. Waugh was asked to consider the possible impact on Cole Harbour if a disaster occurred and the garden centre's inventory of pesticides and fertilizers available for sale were flushed into the harbour. Dr. Waugh made certain assumptions about the amount which would be stored. He considered the fact that the amount of active ingredients is lower in retail garden products. He stated that he really couldn't "comment on fertilizers because in that area you're getting into nutrient enrichment".

Dr. Waugh referred to the fire at Canning involving a warehouse containing 24,000 pounds of pesticides. He said that the amount of pesticides that would be available for sale at the proposed garden centre would be substantially less. He concluded that the impact of all the pesticides on site being dumped into the harbour would not be substantial. He also pointed out there had been 50 - 70 years experience of storing pesticides in the province in several thousand storage sites and only one catastrophic event had occurred, the fire at Canning. Dr. Waugh felt that the risk of a second catastrophe was very low. Dr. Waugh noted that regulations are being enacted which would further minimize the chances of such a catastrophe.

During his rebuttal evidence, Donald Grady introduced a letter and report from Dr. Graham Daborn the Director of the Acadia Centre for Estuarine Research. Despite objections from Atlantic Nurseries Ltd. the Board admitted the document as Exhibit G-44.

The emphasis of Dr. Daborn's Report is the effect of chronic contamination - "continuous, small-scale and often unnoticed leaching" - caused by bags breaking open, storage cans rusting and staff dropping materials while they handle them.

Dr. Daborn points out, as did Dr. Waugh, that fertilizers are "effective growth stimulators of aquatic plants" and a steady input of them "contributes to the trend towards eutrophication" which is a potential problem for Cole Harbour.

Dr. Daborn stresses that without a "substantial buffer between the centre and the foreshore such losses will end up in the water". He believes that "as wide a vegetated buffer zone as possible should be a prerequisite". He did not suggest what depth of buffer is required.

Included in the grounds of appeal is the issue of increased traffic. There was little evidence introduced about traffic. There is considerable traffic in the area during the summer months due to the beaches in the area. The Board is not satisfied that the Appellants have proved that the increase in traffic generated by the proposed garden centre is of such a magnitude to prevent the rezoning.

Section 63(6) of the **Planning Act** applies to this appeal. It states:

> "Where there is an appeal from a decision of Council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

Under Section 63(4) of the **Planning Act** the Board has the following options:

"(a) confirm Council's decision;
(b) reverse Council's decision;
(c) instruct Council to amend the by-law."

Unlike appeals respecting development agreements, the Board cannot refer the matter back to Council for further consideration.

If the Board could refer the matter back to Council it would do so in this case. Council was not made fully aware of the historical developments respecting planning in Lawrencetown. In addition, the possible inconsistency between Council's policies in the Cole Harbour/Westphal M.P.S. and L.U.B. and this rezoning were not examined. From a pollution protection point of view there is no valid distiction between the subject land as it borders the shoreline of Cole Harbour and the lands bordering the shoreline of Cole Harbour contained within the Cole Harbour/Westphal M.P.S. Council was obviously concerned about this rezoning and did attempt to get additional information before approving it.

The Board has heard evidence which Council should have had brought to its attention. The Board must determine whether or not Council's decision is inconsistent with or unnecessary for the protection of the best interests of the municipality. In reaching its decision, the Board may not impose its own decision but must assess Council's decision.

During the course of the hearing, Atlantic Nurseries

Ltd. entered into negotiations with the owner of the subject property to place restrictions on its purchase of the land to ensure that the use cannot be changed from a garden centre without the concurrence of the County. The one caution is that should Atlantic Nurseries Ltd. decide not to purchase the land, the restrictive covenant will have no effect.

Atlantic Nurseries Ltd. in its post-hearing brief argues that the best interests of the Municipality are to be determined on the basis of sound planning principles, citing Link v. County of Cape Breton [1986] 5-B M.B.D. 667. Reference is made to the Board relying on the opinion of expert witnesses to determine whether a decision is based on sound planning principles.

The Board has carefully reviewed the evidence of Paul Morgan and Valerie Spencer who were both qualified as experts in planning matters. Neither witness was asked whether or not the decision to rezone the subject property was based on sound planning principles. Mr. Morgan's evidence suggests that he made his decision because there was nothing to prevent the rezoning. The following exchange took place between the Board and Mr. Morgan:

> "The Board: The other think that I - did you look at the situation vis-a-vis the rest of Cole Harbour, particularly the Cole Harbour/Westphal Plan that comes right up to this intersection and doesn't allow any development on the water and that this was the first commercial, was that something that you felt should be brought to attention or any thought given to it?
>
> A: No I guess the idea that allowing commercial use, especially where there's no policies in

> effect I think the onus is more on us to show that somehow it's going to be a detriment to the area and we can't imply any policies that aren't, you know, aren't in existence.
>
> Q: So did you consider any policies? What is the fact that would allow a rezoning from R1 in here, there's nothing that would prevent it, is that in fact the case?
>
> A: There's nothing to prevent us from considering it, unless we could find for some reason that it would be of detriment to the community, and I have looked at I guess that section under the Planning Act in which I guess is your responsibility and I...
>
> Q: Used that as your same test.
>
> A: Yes, I mean I think - I especially think that where there's no policies in place, other than we contact the Provincial authorities to see do you have any policies that would prevent - we cannot imply any policies that Council has never approved, never adopted, it wouldn't be fair to the Applicant, it certainly wouldn't be fair to Council."

Later in the hearing Mr. Morgan was questioned by Ms. O'Neil and the following exchange took place:

> "Ms. O'Neil: Just one final question Mr. Morgan. Can you tell us why this particular rezoning is in the best interests of the Municipality?
>
> A. Why it's in the best interests - I don't think I can - I wouldn't approach it to say that it's- I believe that say under By-law 24 I would approach the question can it be reasonably accommodated, will it be detrimental to the community, and I would say yes, it can. To say it's in the best interests of the Municipality, is it - I guess the best and foremost use of that property I don't think anybody knows. I mean that's very difficult and a lot of our planning matters are very subjective, their community value. There's no question you can plug in and tell which is the highest and utmost best use and all of that is the value to the community."

When he was asked about the 8 foot setback from Cole Harbour, Mr. Morgan admitted it concerned him. He said he decided it was unlikely Atlantic Nurseries would place the buildings that far back because commercial businesses like to be near the road.

The Board can find nothing in Mr. Morgan's evidence that suggests that it is a sound planning principle to rezone this property commercial when the remainder of the property surrounding Cole Harbour is zoned either residential or parkland. His evidence is that Zoning By-law 24, the governing document, does not prevent the rezoning.

Ms. Spencer as well did not cite any sound planning principle other than the following statement:

> "...in my opinion this proposal does not negatively impact, jeopardize other municipal planning efforts, say on the west side of Cole Harbour, it's not such a...it doesn't create a major conflict with general regional park uses or day park uses. You know, I think any kind of development has an effect, so does leaving land vacant for long periods of time. There's always a continuing kind of affect, but in my opinion there's nothing in jeopardy by this proposal, whether it's environmentally or from the point of view of Provincial Government acquiring lands for a park. This development is seen in context but there's nothing to make a decision, or at least to my mind to make a decision other than the one I made."

In some cases, the Board has looked to the draft M.P.S. as some evidence of the best interests of the municipality. In this case, the draft M.P.S. is still evolving. It is significant, however, that at the time of the rezoning, there was nothing in the draft M.P.S. to prevent commercial development on the subject property. It is also significant that although the Lawrencetown Proposal was approved in 1980, some 9 years later the community has not been able to agree upon a Municipal Planning Strategy. While the Lawrencetown Proposal does suggest that controls be placed on land development pending the report, it also anticipated that the Lawrencetown Citizens Committee would file its report in 6 months. The County does not have to wait indefinitely before it permits rezoning in Lawrencetown. It is also significant that the Lawrencetown Proposal, unlike the Porter Plan and the Revised Porter Plan, did not place any restrictions on lands not designated as parkland.

The evidence before the Board does establish the ecological sensitivity of Cole Harbour.

The Board notes before the proposed garden centre can proceed the Provincial Director of Planning with the Department of Municipal Affairs must issue a regional development permit for the proposed garden centre. Mr. Leedham testified there are a number of criteria to be reviewed as well as other agencies to be contacted. One such agency is the Department of Lands and Forests who manage the Cole Harbour/Lawrencetown Regional Park. The Department of Lands and Forests was not represented at the hearing and the Board does not know what position it will take. In addition Mr. Leedham did not say what position the Department of Municipal Affairs will adopt respecting the proposed development.

The oral evidence from the Provincial Department of Environment was restricted to that of Dr. Waugh. The letter from Donald Grey who works in another part of the Department of

Environment suggests that there may be other areas of concern.

While the experts were not in agreement on whether the rezoning would be detrimental to Cole Harbour, they did agree that a minimum rear set back of 8 feet was insufficient. None of the experts specified what depth was adequate in his opinion. Mr. Ernst from Environment Canada made reference to a 30-meter watercourse buffer zone for ground application in open environments. He said this wasn't necessary where spraying was done within a greenhouse.

The Board notes that the Respondents did not introduce any plot plans showing the proposed location of the buildings. Mr. Morgan made his assessment on the assumption that the buildings would be close to the road because that was normal for commercial operations. The depth of the lot ranges from 607 feet to just under 300 feet.

Under the Cole Harbour/Westphal M.P.S. the setback from Cole Harbour ranges from 30 feet to 200 feet.

During the hearing the Board proposed a 25 to 50 foot strip of parkland which combined with the 8-foot setback under Zoning By-law 24 would mean a minimum 33 to 58-foot setback from Cole Harbour. The Board has no evidence on which to base the depth of parkland that is necessary. The selection of 25 to 50 feet was arbitrary.

The Board believes that if the rezoning were approved Council's decision should be amended to provide that there be a P (Park and Institutional) Zone placed on the subject property between the shoreline of Cole Harbour and the C-1 (Local Business) Zone.

Section 63(4)(c) gives the Board power to allow an appeal by instructing Council to amend the by-law in the manner prescribed. This section is generally used where an applicant has appealed Council's decision refusing to rezone and the Board allows the appeal. The Board in making its proposal for the strip of parkland had intended to use this section to amend Council's decision. Upon reflection the Board does not believe that it can use this section in this case. Neither Council nor the present owner of the subject property have been consulted and the Board does not have expert evidence of how deep a buffer is required.

After considering all the evidence the Board believes that a parkland buffer between the C-1 Zone and the shoreline of Cole Harbour is necessary to protect the best interests of the Municipality. As a result the Board has no choice but to allow the appeal.

In the Board's opinion, Council's decision to rezone the subject property to C-1 (Local Business) Zone without a buffer zone is inconsistent with the best interests of the Municipality.

The appeal is allowed. The Board reverses the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of May, 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

TRASK v. DISTRICT OF YARMOUTH

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE G-D TO G-C TO PERMIT MOTORCYCLE CAMPGROUND - UNDUE HARDSHIP - EXTRAORDINARY AND COMPELLING CIRCUMSTANCES - PLANNING ACT, S. 63(7).

D.T. applied to rezone land in Hebron from General Development Zone to General Commercial to permit a 5 site motorcycle campground. A large motel/restaurant/lounge complex is located nearby. There was public opposition to the proposed rezoning. Council held a secret meeting in reaching its decision.

HELD: The overall growth of the tourism industry is being promoted by the general intent of the M.P.S. Any positive impact on the tourism industry that may result from the 5-unit park will work greatly to the detriment of the positive impact to the tourism industry that the adjacent hotel complex has on the municipality. A secret Council meeting does not necessarily amount to extraordinary or compelling circumstances.

NSMB-6-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **DAVID GEORGE TRASK** from a decision of the Council of the Municipality of the District of Yarmouth made the 1st day of February, 1989, refusing to rezone certain lands on Lakeside Road, Hebron, owned by the Appellant, from General Development (G-D) Zone to General Commercial (G-C) Zone for the purpose of authorizing a motorcycle campground.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: DAVID GEORGE TRASK, Appellant, on his own behalf;

IRVING PINK, Q.C., on behalf of the Respondent, the Municipality of the District of Yarmouth.

HEARING DATES: May 11, 1989.

DECISION RENDERED: May 19, 1989.

DECISION: **Appeal dismissed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, c. 9. Council refused the Applicant and Appellant, **DAVID GEORGE TRASK'S** request to rezone his land on the south side of Lakeside Drive in Hebron, near Doctor's Lake, from the existing General Development (G-D) Zone to General Commercial (G-C) Zone. He sought this rezoning for the purpose of installing a five-site motorcycle campground.

The Appellant, David George Trask, is a long-time employee of the Maritime Tel and Tel Company. He has been resident on the subject property on Lakeside Drive for over seventeen years and is the owner of the land he seeks to rezone.

By FAX, he filed a Notice of Appeal with the Board which was received on February 21, 1989. In that Notice of Appeal he complained of a decision of the Municipality of the District of Yarmouth for a refusal decision which the Notice said was made on the 6th day of February, 1989. Evidence at the hearing disclosed that the actual Council decision was made on February 1, 1989. The Notice of Appeal was dated February 17, 1989.

Under Section 16(1), c. 9, S.N.S. 1981, the Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon, to determine this appeal.

The Board heard this appeal at its 10:00 a.m. sittings on May 11, 1989, at the Council Chambers, 403 main Street, Yarmouth, Nova Scotia. After hearing the evidence and argument, the Board adjourned first to view the site and secondly to prepare its written decision.

The Municipality took no objection to the jurisdiction of the Board. The Appellant satisfied the Board on all jurisdictional matters. The Board therefore took jurisdiction to hear this appeal.

The Appellant testified for himself. The Municipality called William Scott, Warden Robert Anthony, former Warden Daniel Stanton, Terry Grandy, Sidney MacNaughton, and Brian D. Noble. Gary Saunders and Carol Drew made presentations of their own at the termination of the Municipality's case.

The subject property contains approximately 2.5 acres. It abuts the south side of Lakeside Drive in Hebron and has a frontage thereon of about 450 feet. Lakeside Drive forms its north boundary. Occupied residential property lies to its east, to its south and to its west.

To the east, immediately beyond the empty residential property, is a large motel/restaurant/lounge complex oriented to the tourist business known as Manor Inn. The west portion of the property is a swamp along Lakeside Drive. Outside of the fact that the swamp is being rezoned, it does not feature very much in this rezoning.

The east portion of the land is on a rocky knoll covered with lawn. To the front of this lawned area is an older farm house and driveway adjacent thereto. This farmhouse is occupied by the Appellant and his family. At right angles and behind this building is an old barn which is presently half developed into a recreational facility containing certain equipment such as a pool table. Adjacent to this barn is an old converted dairy storing operation which is partly converted towards use as washrooms. Behind this semi-converted barn an ornamental brook runs.

From the site the nearest visible structure is the rear of new two-storey hotel construction on Manor Inn property which is a large complex at the head of Doctor's Lake. Adjacent to the Manor Inn property is a 50-foot right-of-way leading to a residential subdivision in which there is at least one large house. Then there is a couple of hundred feet of intervening property owned by Dr. Murphy and then the subject property. The building on property to the west is barely visible from the usable portion of the subject site. The approximate edges of the swamp on the property are shown in Exhibit T-6, an excerpt of a plan following page 11 which is the Planner's Report on the amendment to the By-law.

Mr. Gary Saunders, a planner employed by the District Planning Commission (which has jurisdiction to plan for the Municipality), prepared, on August 22, 1988, a review for "Ziggy's Campground, Lakeside, Hebron, Yarmouth County". He noted that the existing use of the subject property was residential. He noticed that the existing M.P.S. generalized future land designation of the subject land was "General Development". The land fell within the "General Development Zone".

The rest of his report requires detailed quotation:

> "5. M.P.S. REVIEW RE: THE REQUEST AND PROPOSAL
>
> The preamble to the Planning Strategy states, among other things, the general intent of the Strategy is to ensure that future development in the Municipality, in whatever form it may take, is compatible with surrounding land uses. The overall goal of the Strategy is to ensure that the future development of

the Municipality is directed in such a manner to best develop the natural and man-made environments for the residents.

One of the objectives of the Strategy is to protect residential development from encroachment of incompatible land use. The economic development goal of the Strategy is as follows:

> To encourage the economic growth of the industrial, commercial and tourism sectors in order to maximize employment opportunities and related benefits for the residents within the context of a regional approach.

Objectives towards this goal relevant to this review include:

> To encourage the development and expansion of small scale commercial enterprises so as to best serve the residents of the Municipality.
>
> To encourage the tourism industry to expand in all areas of the industry.

Policy A-1 of the Strategy states Council's intention to designate the more rural area of the Municipality as General Development to accommodate a wide range of land use activities. Policy A-2 states that future development within this land use designation will be guided through the provisions of the By-law and that the By-law will apply, among other zone categories, a General Commercial (G-C) Zone for commercial uses. Policy B-44 establishes the (G-C) Zone in the By-law. to minimize conflict between commercial uses and existing residential development, Policy B-45 permits new commercial uses only by amendment to the By-law subject to the following criteria:

> a) that the proposed development abut a public road listed and maintained by the Department of Transportation;
>
> b) that traffic noise and headlight glare does not cause nuisance effects upon abutting residential uses;
>
> c) that the proposed development conforms with all relevant criteria of Policy F-6 in the implementation Chapter.

Policy F-6 of the Implementation Chapter states:

In considering amendments to the Land Use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:

a) that the proposal is in conformance with the intents of this Strategy and with the requirements of all the other municipal by-laws and regulations;

b) that the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy of road networks in, adjacent to, or leading to the development;

iii) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

iv) creating a negative impact upon the natural resource base.

c) suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses and the proximity of highway ramps, railway rights-of-way and other nuisance factors.

A review of the proposal in accordance with Policy B-45 reveals:

a) that the proposed development abuts Lakeside Drive, a public road listed and maintained by the Department of Transportation;

b) the attached plot plan does not identify a parking area. It is reasonable, however, to conclude that a parking area similar to other campgrounds would be located on individual tent sites. Aside from the Applicant's place of residence, there are no residential uses within the general vicinity of the site that would be effected by headlight glare or traffic noise.

A review of the criteria of Policy F-6 reveals that the proposal satisfies:

i) Subsection (a) in that the proposal satisfies the criteria of Policy B-45 to amend the Land Use By-law;

ii) Subsection (b)(i) in that there is no municipal cost related to the development;

iii) Subsection (b)(ii) in that the development has direct access to Lakeside Drive, a public road listed and maintained by the Department of Transportation;

iv) Subsection (b)(iii) in that the potential for a campground for tents to contaminate or create erosion or sedimentation to the brook which runs through the subject property is negligible.

v) Subsection (b)(iv) in that there is no natural resource base to be impacted upon by the proposed development;

vi) Subsection (c) in that the proposed use is of a seasonal nature. It is reasonable to conclude that any tent site would be graded to accommodate runoff during rains. There would appear to be a sufficient soil depth to support a tent. The location of the watercourse can be considered an amenity. There are no highway ramps, railway right-of-way or other nuisance factors.

6. CONCLUSION AND RECOMMENDATION

This report concludes that in the absence of any residential uses in close proximity to the proposed use, the campground can be considered a compatible use in the area.

The request and proposal meet the criteria of Policy B-45 and F-6 of the Strategy. Therefore, it is the recommendation of staff that the request to rezone the subject property from General Development (G-D) to General Commercial (G-C) for the purpose of establishing a camp grounds (tenting) for motorcyclists and accessory recreational facilities in the existing barn be granted."

Before Council, according to the Minutes, Terry Grandy, an owner of Manor Inn, and the adjacent landowner, Dr. Murphy, vociferously protested the rezoning permitting the location of a motorcycle campground on this property. One hundred and fifty people petitioned Council against the campsite. They signed the following Petition:

> "We the undersigned oppose the proposed amendment to rezone land on Lakeside Drive to allow for the development of a tenting campground for motorcyclists. Reasons are listed below:
>
> 1. Heavy concentration of motorcycles would be attracted to these campgrounds on specific occasions.
>
> 2. We fear for the safety of our people.
>
> 3. Motorcycle clubs with an unsavoury reputation could be attracted to these grounds on a weekend or any special time so called."

The Council Minutes on these items are fairly brief and perhaps warrant a detailed quotation:

> "2. The Council held a Public Hearing on the application by David Trask to amend Schedule "A" of the Municipal Land Use By-law for the purpose of establishing a camp ground (tenting) for motorcyclist. Mr. Trask was present along with thirty-three (33) people from the Hebron area. Gary Saunders presented a report on the application which had been presented to the Planning Advisory Committee. The property is located...the applicant proposes a camp ground (tenting for motorcyclist. In conjunction with the grounds an existing barn will be used for recreation purposes, such as pool and video games...The Board concluded that in the absence of any residential uses in close proximity to the proposed use, the campground can be considered a compatible use in the area. The request and proposal meet the criteria of Policy B-45 and F-6 of the Strategy and therefore it is the recommendation of the staff that the request to rezone the subject property from General Development (G-D) to General Commercial (G-C) for the purpose of establishing a campground for motorcyclist and accessory recreation facilities in the existing barn be granted.
>
> Mr. Daniel Stanton [an ex-Warden] presented a petition to the Warden containing one hundred and fifty (150)

> names of people in the Hebron area. The people indicated in the petition that they wanted Council to deny this application on the grounds that the area would not be compatible with a motorcycle campground. Retiring Inspector of the R.C.M.P., Mr. Sid McNaughton described to Council his past experience dealing with motorcycle campgrounds and motorcycle gangs. He indicated that these people were undesirable and violent and dangerous to the public and would cause disruption to the whole community. He also described several incidences that he had personally experienced with motorcyclists in previous years. Mr. Trask, the applicant suggested that the capacity of the park was only five (5) lots and there would be only five (5) bikers allowed on the area at one time. It was pointed out however that this type of a campground cannot be controlled due to other bikers wanting to locate in the area or visit the area. Several people in the audience presented their views regarding this application and discussed with Mr. Trask the requirements of the Campground Association regulations and the problem associated with a campground of this nature. This matter was discussed in detail for some period of time. It was moved by Deputy Warden Patricia Rodney, seconded by Councillor Reg. LeBlanc and carried that the Council discuss this subject, in private, for approximately fifteen minutes and then they would be prepared to make a decision. After a lengthly [sic] discussion, the people filed back in the Council Chambers and Council continued to review the application. It was moved by Councillor Brian Noble, seconded by Councillor Jan Morrow that the application received from David Trask to rezone lands in the Hebron area from General Development (GD) to General Commercial (GC) be denied. Motion carried unanimously."

The Board, as succinctly as it can, summarizes Mr. Trask's appeal arguments as follows:

1. According to the Planner, his proposal meets all the criteria for a rezoning.

2. That there is a need for such a campsite in Yarmouth since over 3,000 motorcycles a year come off "the boat" alone and that there are some 20,000 or

30,000 motorcycles owned in Nova Scotia alone.

3. That the opposition to his project is not founded on any grounds recognized by the M.P.S. and therefore that opposition must be disregarded by Council.

4. The Council reacted to the popular opposition to his proposal. That opposition was not founded on firm foundations in the M.P.S. and therefore Council, although unanimous, must have decided for reasons other than those contained in the M.P.S. If Council decided for reasons other than those contained in the M.P.S. their decision was contrary to the intent of the M.P.S. and therefore subject to being appealed successfully at this hearing.

Mr. Saunders was examined heavily by the person who called him, Mr. Pink. Mr. Saunders stood by his report the Board has already extensively quoted. Mr. Pink argued that the real intent of the M.P.S. was not to promote this type of development. Mr. Pink conceded, in argument, that the Council has no province to discriminate against "bikers" as a group. Council, however, have a discretion whether or not to grant a rezoning. Council, he argued, exercised that discretion properly in this occasion. Mr. Pink de-emphasized what he alluded to as "technical compliance" with the criteria contained in the M.P.S.

Mr. Pink in his argument also emphasized the effect on tourism this particular development might have.

The Board can find little fault with the summaries and conclusions on the technical criteria listed in Mr. Saunder's Report. These were dealt with in argument between the Board and Mr. Pink and Mr. Trask and the Board.

Mr. Trask, in argument, conceded that some motorcyclists created a bad image for motorcyclists in general. Mr. Trask suggested that he would be required to be licenced by the Provincial Department of Tourism. His campground would be licenced and strictly supervised. The Government could cancel his licence if his customers misbehaved on the site. Mr. Trask emphasized that he was bringing his own family up on this site in the farmhouse. He argued he had no desire to expose his family to undesirable elements that might be present in the motorcycling community. Mr. Trask said that the problems contemplated by the inhabitants of Hebron were distorted views. Perceptions achieved from television alienated Hebron inhabitants from motorcyclists. In his words, these concerns were "hypotheticals" which should not be dealt with until they actually arose. Mr. Trask assured everybody that he would make the maximum efforts to see that none of these feared situations arose.

To the contrary, Mr. Grandy testified that, without any proper permission in the summer of 1988, Mr. Trask had essentially run for some weeks his campground. Grandy emphasized that his large, nearby, corner-lot establishment of Manor Inn received injury from:

1. the incidence of noise from motorcyclists making the turnoff up the dirt road to the site;
2. the incidence of litter and beer bottles along the roadway and on Manor Inn lawn;
3. the incidence of theft from and damage to his premises;

which contemporaneously increased immensely with the illegal operation of Mr. Trask's campground. Mr. Grandy felt this increase was no coincidence. Mr. Grandy felt that the problems posed by this campground were not hypothetical.

Mr. Grandy went on to point out that he had a considerable investment in this corner property and that his tourist traffic was basically done by advertising and through expensive pre-season promotion. With the opening of the 100 Series Highways, Route No. 1, on which he was located, was now a back road. He relied, not on drop-in traffic, but from repeat traffic from previous years and from his current tourism motion traffic. His promotion pushed the quietness and beauty of his location and the diverse activities available on his site. He claimed to be making an asset out of a possible detriment, i.e. lack of exposure on a main highway. He used the remoteness of his property as a positive promotional asset. Its seclusion was advertisable and marketable.

Mr. Trask argued that none of these deleterious activities could be "proven" to be attributable to either himself, his operation of the property, or that of his customers.

From the evidence one discerned that there were sewage disposal problems north from the Town of Yarmouth all along the shore of Doctor's Lake. These are alluded to as well in the M.P.S. These sewage disposal problems were exacerbated by the old location along the shoreline of the Town water supply for the Town of Yarmouth. Over the years the Town of Yarmouth has allowed Municipal inhabitants along the lakeshore to tap the waterline as users. This easily available central water system allowed excess production of waste water from the Municipal inhabitants.

Sixty per cent of the development, residential and otherwise, in the Municipality occurs along this general corridor close to the Town of Yarmouth. As contemplated by the M.P.S., a general sewer installation starting from Yarmouth running along the lakeshores and terminating beyond the Hamlet of Hebron at the Manor Inn are designed as a heavy capital structure (partly paid for by the Municipality) to reduce the sewage disposal problem which is polluting the lakes. Only proposed in the M.P.S., this sewer nears completion as of the writing of this decision.

A retired R.C.M.P. officer gave generalized information concerning the conduct of some people who find motorcycles the best method of transportation.

Mr. Grandy went on to complain about a fire incident on his premises which was coincidental to his opposition to the proposed development of a motorcycle campground on the subject property.

Mr. Grandy testified that he had, at his Manor Inn property in the summer of 1984, direct, unpleasant confrontations with a group of 14 males on 14 motorcycles. They arrived on his property in a group. He refused them entrance to the lounge on the grounds that the lounge was already filled. They insisted on lounge service, in circumstances in which Mr. Grandy felt threatened and intimidated. On that occasion, Mr. Grandy called upon the R.C.M.P. for assistance and did not receive it to the extent he desired. Mr. Grandy has no confidence that if the incidence of motorcyclists in the area is increased he will be able to preserve the seclusion that has made his Manor/Motel/Lounge tourism facility a desirable and viable portion of the tourism industry of Yarmouth.

The Board carefully notes the statements contained in the Petition quoted above. The Board notes Mr. Trask makes no real argument to refute the fact that the large number of people in this area are against the rezoning. The Board believes they are against the rezoning for the reasons stated in the Petition. Mr. Trask had opportunity to bring people before the Board from the community who supported his application. He did not do so.

Mr. Trask argues that he is promoting a small needed industry in the area and he is going to hit a market niche that is not presently served. He conceded, in cross-examination by Mr. Pink, that with only five units for rental it is not going to be a large positive impact on the community. The Board does not see a great deal of economic justification for its existence.

The Board concedes that, in the general terms in which the M.P.S. is drafted, a decision of Council to support Mr. Trask's rezoning could be within the intent of the M.P.S., basically for the reasons cited in the report of Mr. Saunders.

The opposite question then arises: Can the decision of Council be supported as also being within the intent of the M.P.S.? If it can not, then Mr. Trask's appeal must succeed.

The M.P.S. was drafted some time ago for the Municipality of the District of Yarmouth and is perhaps due for review. Be that as it may, the Board must deal with the intent of the existing M.P.S. To do that, the Board has read the entire M.P.S. and has read the entire L.U.B. and has made excerpts of many relevant portions of both those documents in the Schedule "A" attached to this decision. The Board has paid particular attention also to Mr. Saunders' written report.

The M.P.S. is laced throughout with reference to tourism. The evidence of development in this Municipality since the approval of the M.P.S. has shown that tourism has become even more important to the Municipality and the economic well-being of the southwestern portion of the Province. Mr. Trask has brought forward a proposal which will service a small portion of the tourism industry, namely motorcyclists. Mr. Grandy has satisfied the Board that the location at this place of even this small a motorcycle park will have a gravely disadvantageous affect on Mr. Grandy's tourist establishment. The evidence shows that Mr. Grandy is the latest in a series of owners of this property and that he has attempted to bring it back to strength from previous lows. According to Mr. Grandy he has been successful in doing this. The impact of his Inn on the tourism industry is considerable and his impact on the economy of this part of the Municipality is considerable. Any positive impact on the tourism industry that may result from the five-unit park will work greatly to the detriment of the positive impact to the tourism industry that the Grandy institution has on this Municipality.

The overall growth of the tourism industry is being promoted by the general intent of the M.P.S.

The need to support and enhance tourism as spelled out in the M.P.S., can support Council's decision in this case.

The Board and Council must, at least, listen to the public opposition to this proposed development.

Council had adequate tourism reasons to support their decision to refuse this small rezoning in this particular area.

The Board refers back to the written report of Mr. Saunders where he says:

> "To encourage the tourism industry to expand in all areas of the industry".

That is one of the two goals he himself has cited. The Board agrees that in this particular case that theme is the intent of the M.P.S. it must govern. Council's decision has supported that theme.

Council has also signalled that it strongly supports the Manor/Motel/Lounge complex when it extended northward from the northermost Hamlet of Hebron boundary the sewer system to service this particular Manor Inn as its northern-most terminus.

The Board cannot say the Council's decision is not reasonably within the intent of the M.P.S. It believes it's decision is also within the intent of the M.P.S. That being the case, the Board is unable to reverse the decision of Council as requested by the Appellant. The Board refers to Section 63(3) and 63(5) of the **Planning Act.**

The Board must also in these circumstances refer to Section 63(7) of the **Planning Act.** (Under which Applicants can obtain relief in unusual or exceptional circumstances.)

Council in this occasion held a meeting, partly in secret, which is not in conformity either with their own regulations or with any doctrine of fairness. The Board believes this was done, in error, in order to quell an anxious crowd. The evidence of the then presiding Warden indicates this to the Board. The Board is satisfied that secret time was probably used as a committee-type hearing. Council's method may violate the doctrine of fairness.

The doctrine of fairness may raise Section 63(7) of the **Planning Act.**

In this case, however, the Board is prepared to say that the reasons for the motion to adjourn into a private hearing were, on the evidence, legitimate. These proceedings were held for purposes of crowd control and, also, for purposes of discussion of personalities. Councils often do this in other matters such as expropriation matters. The Applicant/Appellant has not shown he will suffer an undue hardship because of Council's decision. Council's partially secret meeting does not, in the opinion of the Board, amount to extraordinary or compelling circumstances in this appeal enabling the Board to allow the appeal. The Appellant cannot succeed on those grounds either.

The Board therefore dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of May, A.D., 1989.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM MUNICIPAL PLANNING STRATEGY - EXHIBIT T-1

INTRODUCTION

Preamble

...It also contains statements with respect to future capital spending programs that the Municipality may undertake. ...

The general intent of the Strategy is to ensure that future development in the Municipality, in whatever form it may take, is compatible with surrounding land uses. It is also the general intention of the Strategy to rationalize capital expenditures so as not to cause undue financial hardship upon the Municipality.

...

Page 3

...

History and Context

...For example, Hebron was noted for its tanneries and shoe factories. Today, the dominant resource of the area is the inshore and off-shore fishery.

...

Page 5

...the potential for new residential, as well as other competing land use activities, along the existing road system increases the probability of land use and environmental conflict.

...

Page 6

...

Goals and Objectives

...The overall goal of the Strategy is to ensure that the future development of the Municipality is directed in such a manner to best develop the natural and man-made environments for the residents.

...all goals and objectives should be considered collectively.

...

Page 8

II Economic Development

Goal To encourage the economic growth of the industrial, commercial and tourism sectors in order to maximize employment opportunities and related benefits for the residents within the context of a regional approach.

Objectives

... To encourage the tourism industry to expand in all areas of the industry.

...

IV Recreation and Education

...

Objectives

... To protect and enhance sites of historical significance and buildings of architectural or historical merit.

Page 9

To encourage the preservation of lands having inherent natural, biological and recreational value and to maintain and enhance the quality of such environments.

...

V General Government Services

Goal To provide adequate social services for the citizens of the Municipality.

Objective To cooperate with other agencies and governments in making available to the residents the services necessary to ensure their health, welfare and safety.

Page 10

A. ENVIRONMENTAL DEVELOPMENT

Residential

Historically...Communities such as...Hebron...became rural centres of social and economic activity.

...areas immediately adjacent to the Town of Yarmouth including...Dayton realized a significant portion of this development. Other areas on their periphery such as...Hebron...demonstrated slightly smaller gains...

Page 11

...Council should...establish...policies...necessary...to minimize the potential...man-made land use conflict.

A-1 It shall be the intention of Council to designate a General Development category on the Generalized Future Land Use Map (Map 7) to accommodate a wide range of land use activities.

A-2 Within the General Development designation shown on Map 7, future development will be guided through the provisions of the Land Use By-law. The By-law will apply three (3) zones to the General Development designation. These are, a General Development (G-D) Zone which will permit a wide range of rural land uses (Refer to Policy A-3), a General Commercial (G-C) Zone for new commercial uses (Refer to Policy B-44) and a General Industrial (G-I) Zone for new industrial uses. (Refer to Policy B-19)

A-3 It shall be the intention of Council to establish in the Land Use By-law a General Development (G-D) Zone to permit the following uses:

a) single, two and three family dwellings;

b) mobile homes, (Refer to Policy A-13)

Page 12

c) existing mobile home parks;

d) converted dwellings; (Refer to Policy A-8)

...

i) recreational uses;

...

m) existing commercial uses; (Refer to Policy B-42)

...

The communities...Hebron-Dayton...generally exhibit the same linear development pattern common throughout much of the Municipality...these communities display a greater range of land use activities in a more compact urban-like setting. These characteristics are best illustrated in the Hebron-Dayton area where development has resulted in the appearance of a single linear community. As the...communities are the most highly developed areas in the Municipality, they may also experience other urban type issues such as the lack of road frontage for development purposes and problems associated with older on-site sewage disposal systems.

...

Throughout the residential fabric, there are a number of institutional uses

Page 13

including a school, post office, community hall and churches as well as a fire department in the communities of Port Maitland and Hebron. These well established uses are considered integral features within the residential setting.

...

In terms of commercial development, each community has at least one service station and, in most cases, a general store. As well, there are established home businesses and occupations such as baking goods and hairdressing. Beyond these similarities, commercial development in each community varies in number and in the range of goods and services. (See Economic Development Chapter). As for industrial development, there [is]...a small candy factory in Hebron.

...

A limited central water service is provided to the Hebron-Dayton area...(See water Resources and Municipal Services Sections of this Chapter).

In future, a variety of residential housing types and commercial developments will be encouraged to locate in these communities.

...

Page 14

..the potential for land use conflict is likely to increase considering that future uses will have to compete for a limited quantity of land along existing public roads. There are also the issues respecting central water and sewer services. In an attempt to resolve these situations, Council should designate...the Hebron-Dayton area...as Hamlets...to ensure that future development is harmoniously integrated into these long established communities.

> A-4 In recognizing that...Hebron-Dayton...the most highly developed communities in the Municipality it shall be the intention of Council to designate these communities as Hamlets on the Generalized Future Land Use Map, Map 7.

...[The evidence has shown that although the subject land is located in the Hebron-Dayton community it is outside the Hamlet designation on the Gen.Flum.]

Page 22

Water Resources

The Town of Yarmouth owns and operates the only central water system in the county. The source of supply is Lake George. Under the Water Act of 1919, the Nova Scotia Water Authority defined and prescribed a protected area surrounding Lake George in 1964...

Built during the 1890's, the water line from Lake George to the Town also serves many residents of the Hebron-Dayton area.

...

It is hoped that these problems will be cleared up in the future with the installation of proper sewage disposal systems.

...

Page 23

...

It may also be possible that once the needs of the Town are met, that future development in the Hebron-Dayton area may be connected to central water services....

> A-31 It shall be the intention of Council to approach the Town of Yarmouth as to the feasibility of extending central water services to the residents of the Municipality, particularly in the Hamlet of Hebron-Dayton...

...

Climate

...For example, date [sic should be data] on sunshine and fog would be particularly useful for people involved in...tourism...

Page 26

Municipal Services

One of the major issues related to increased growth in the Municipality is the usual demand for central services in the more densely populated areas....

The study identified pollution problems in the communities of...Hebron-Dayton...but not to the degree which might necessitate central services. However, if these areas continue to expand in future, some organized form of servicing will be necessary. The cost of central services is extremely expensive where housing density is insufficient. Any decision to install central services would have to be supported by a policy to ensure that infilling occurs to minimize the cost to each household...

Page 27

...Council should also investigate the feasibility of establishing wastewater management districts in other areas of the Municipality experiencing pollution problems, particularly Hebron-Dayton...

Page 28

A-37 Further to Policy A-36, it shall be the intention of Council to investigate the feasibility of establishing on-site waste-water management districts under The Municipal Act in other areas of the Municipality, particularly in the Hamlet of Hebron-Dayton...in order to alleviate existing pollution problems...

...

Page 32

B. ECONOMIC DEVELOPMENT

A major goal of this Strategy is to encourage and promote economic growth which will benefit area residents...the overall intention is to facilitate the expansion of all sectors of the local economy in a rational, comprehensive manner...this Strategy will develop land use control guidelines which will...secondly, outline general policy intentions of Council towards economic growth.

...

Page 40

In future, a range of new resource and non-resource industries could be accommodated in the General Development designation. Such uses should be regulated to minimize the potential for conflict with residential development. Therefore Council should establish a general industrial zone and permit industrial uses except asphalt paving plants only by amendment to the Land Use By-law and subject to special requirements and restrictions where they abut residential, institutional and recreational uses.

...

Page 52

Tourism

The tourism sector experienced rapid and sustained growth during the sixties and early seventies...

It has been suggested that the major thrust of tourism development in South Western Nova Scotia should be the development of programs and projects that will encourage tourists to remain in the area for an extended period of time...Recreational opportunities and facilities are inter-related with tourism; therefore, efforts to provide and upgrade various facilities should be viewed in a complementary manner...

B-35 It shall be the intention of Council,...to encourage the development of projects and schemes which will attract and encourage tourists to remain longer in the area...

Page 53

...

d) encouraging the construction of new tourist, accommodation facilities (motels, restaurants and campgrounds) and the upgrading of existing facilities.

...

B-38 When determining recreation projects and priorities it shall be the intention of Council to evaluate recreational proposals with respect to potential tourist related benefits.

...

Page 56

Commercial

Commercial activity in the Municipality is concentrated within a three mile radius of the Town of Yarmouth. Within this area, commercial development occurs in both compact and linear form along Highways #1 and #3...In the Hebron-Dayton area, commerce has developed in linear fashion along Highway #1. This corridor is the most highly developed commercial area in the Municipality comprising twenty-five enterprises of which a major component is tourist-oriented facilities. Its development is primarily due to the area being serviced by the old Town water line and that Highway #1 was a regional arterial road and tourist route prior to the completion of Highway #101...

In the past, commercial growth in the Municipality has been relatively insignificant...the potential for new commercial growth to eventually conflict with residential land uses will increase.

Page 57

As mentioned, almost all commercial development is highway oriented...To protect residential uses, it is highly desirable to develop some land use controls to regulate commercial activities.

B-42 It shall be the intention of Council to consider existing commercial uses in the General Development (G-D) Zone...as conforming uses and to allow such uses to expand in future...

...

B-44 It shall be the intention of Council to establish a General Commercial (G-C) Zone in the Land Use By-law to accommodate a wide range of new commercial uses in the General Development designation.

Page 58

B-45 It shall be the intention of Council to permit new commercial uses in the General Development designation only by amendment to the Land Use By-law from the General Development (G-D) Zone to the General Commercial (G-C) Zone subject to the following criteria:

a) that the proposed development abut a public road listed and maintained by the Department of Transportation.

b) that traffic noise and headlight glare does not cause nuisance effects upon abutting residential uses;

c) that the proposed development conforms with all relevant criteria of Policy F-6 in the Implementation Chapter.

...

Page 66

...In addition, the importance of the ferry to the tourist industry cannot be underestimated....

...

C-12 It shall be the intention of Council to seek improved ferry services from Yarmouth to Bar Harbour and/or Portland Maine.

...

Page 67

D. RECREATION...

Recreation

...tourists would be encouraged to remain longer in an area which offers a wide range of recreational opportunities.

...

Page 68

MAP 4

CAPABILITY FOR OUTDOOR RECREATION

Hebron-Doctor's Lake - Moderately High Capability

...

Page 69

These may include...popular areas currently used by residents for recreation, facilities which cater both to tourists and local residents and other special places or features of interest...

...

Page 70

...

D-5 It shall be the intention of Council in conjunction with provincial departments involved in recreational activities, to devise a long-term development strategy for the provision of recreational services in the Municipality. Such a strategy should consider the following.

a) determination of recreational needs and preferences of area residents;

...

Page 71

...

f) establish priorities and a rational delivery system with an awareness of tourist related benefits and to actively seek financial assistance.

...

Page 72

E. GENERAL GOVERNMENT SERVICES

...

Page 74

E-4 It shall be the intention of Council to carry out negotiations with the Town of Yarmouth for the installation of fire hydrants along the old and new water transmission corridors from lake George to the Town of Yarmouth, specially the hamlet of Hebron-Dayton and in the South Ohio area.

Page 75

F. IMPLEMENTATION

F-2 ...it shall be the intention of Council to maintain a program of ongoing planning through its Planning Advisory Committee. Such a program may include...special studies, concerns of a regional, environmental, economic matter and any other matters which Council considers suitable.

...

F-4 The principal mechanism by which land use policies are inplemented is the Land Use By-law...

Page 76

F-5 It is not intended that all land in the Municipality shall be zoned at the outset as indicated by the policies of this Strategy or as indicated on the Generalized Future Land Use Map (Map 7). Rather, in order that Council may encourage economic development in the Municipality, yet maintain some control over such development, initial zoning provisions will reflect the existing development pattern but major development proposals shall be processed as zoning amendments or by the use of development agreements.

...no zoning amendments shall be permitted except in conformance with all policy intents of this Strategy.

Criteria For Amendment to the Land Use By-law.

F-6 In considerating amendments to the Land use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:

a) that the proposal is in conformance with the intents of this Strategy and with the requirements of all the other municipal by-laws and regulations;

b) that the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy of road networks in, adjacent to, or leading to the development;

Page 77

iii) the potential for the contamination of watercourses or the creation or erosion or sedimentation;

iv) creating a negative impact upon the natural resource base.

c) suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses and the proximity of highway ramps, railway rights-of-way and other nuisance factors;

...

Page 78

...

Amendments to the Planning Strategy

F-11 This document and all associated maps constitute the official Municipal Planning Strategy of the Municipality of the District of Yarmouth. An amendment to this Strategy shall be required:

a) where any policy intent is to be changed;

b) where a zoning amendment will violate the Generalized Future Land Use Plan map;

c) where the findings or recommendations of detailed studies would result in an amendment that refines the Municipal Planning Strategy.

...

Page 79

Review of The Municipal Planning Strategy

F-14 In accordance with Section 49 of The Planning Act, this Strategy may be reviewed when either the Minister of Municipal Affairs or Council deems it necessary but in any case shall be reviewed within five years from the date of its coming into force or the date of its last review.

Capital Program

F-15 In addition to regulating private development, Council may undertake programs of its own to encourage development in certain areas to enhance, improve or protect the environment of the Municipality, or to provide a greater range of social, recreational or cultural facilities and activities. It is one of the purposes of this Strategy to aid in establishing such programs.

Therefore, it shall be the intention of Council to incorporate the policies and provisions of this Strategy into the Capital Budget and the three year

Capital Program of the Municipality to the greatest extent possible, with the goal of eventual full integration of planning, capital programming and budgeting.

EXTRACTS FROM THE LAND USE BY-LAW - EXHIBIT T-8

MUNICIPALITY OF THE DISTRICT OF YARMOUTH

Page 1

PART II

DEFINITIONS

For the purpose of this By-law, all words shall carry their customary meaning except for those defined hereafter.

1. Accessory Building means a subordinate building or structure on the same lot as the main building devoted exclusively to an accessory use.

2. Accessory Use means a use subordinate and naturally, customarily and normally incidental to and exclusively devoted to a main use of land or buildings and located on the same lot.

...

Page 2

9. Building means any structure whether temporary or permanent, used or built for the shelter, accommodation or enclosure of persons, animals, material or equipment...

Page 3

...

11. Camp means a land and building complex designed or used for group sport, recreational or cultural activities which may have facilities for sleeping and the preparation and serving of food, operated under single ownership on a temporary or seasonal basis.

...

Page 4

...

19. Development means any erection, construction, addition, alteration, replacement or relocation of or to any building or structure and any change or alteration in the use made of lands, buildings or structures.

Page 5

...

21. DWELLING:

a) Dwelling means a building, occupied or capable of being occupied as a home, residence or sleeping place by one or more persons containing one or more dwelling units and shall not include a hotel, a motel or apartment hotel.

...

Page 7

...

22. Erect means to build, construct, reconstruct, alter or relocate...

...

Page 10

...

33. Hotel or Motel means a building or buildings or part thereof on the same site used to accommodate the travelling public for gain or profit, by supplying them with sleeping accommodation with or without meals but without private cooking facilities.

...

Page 12

37. Lot means any parcel of land described in a deed or as shown in a registered plan of subdivision.

...

Page 14

42. Main Building means the building in which is carried on the principal purpose for which the building lot is used.

...

Page 15

...

48. Obnoxious Use shall mean a use which from its nature or operation creates a nuisance or is offensive by the creation of noise or vibration, or by reason of the emission of gas, fumes, dust, oil or objectionable odour, or by reason of the unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste or other material.

...

Page 17

56. Private Park means a park other than a public park which is privately owned and operated.

...

60. Recreational Use means the use of land for parks, playgrounds, tennis courts, lawn bowling greens, indoor and outdoor skating rinks, athletic fields, golf courses, picnic areas, swimming pools, day camps, community centres and similar uses to the foregoing, together with necessary and accessory buildings and structures, but not including a track for the racing of animals, or any form of motorized vehicles.

...

Page 22

...

76. Tourist Establishment means a building or buildings which are used to accommodate the travelling public for gain or profit by supplying them with sleeping accommodation, with or without meals, and shall include a guest house, tourist cabins, a motel, an auto court, and a hotel.

...

78. Tourist Trailer Park means an establishment comprising land or premises under single ownership used or intended to be used for the parking of tourist trailers on a temporary or seasonal basis, such as for a day, a week or for a season.

...

Page 25

PART III

ZONES AND ZONING MAPS

1. ...the following zones...may be referred to by the appropriate symbols.

Zones	Symbols
General Development	G-D
General Commercial	G-C

...

ZONING MAPS

2. ... Schedule "A" - Municipality of the District of Yarmouth.

... Schedule "C" - Hamlet of Hebron-Dayton

Page 26

ZONES NOT ON MAPS

3. The zoning maps of this By-law may be amended, in conformance with the Municipal Planning Strategy, to utilize any zone in this By-law, regardless of whether or not such zone had previously appeared on any zoning map.

Page 27

PART IV

...

SYMBOLS

1. The symbols used on the Schedules "A",..."C"...attached hereto, refer to the appropriate zones established by this By-law.

...

Page 28

...

CERTAIN WORDS

4. In this By-law, words used in the present tense include future; words in the singular number include the plural; words in the plural include the singular number; ...and the

word "shall" is mandatory and not permissive.

PROHIBITED USES

5. In this By-law, any use not listed under permitted uses in a particular zone is prohibited.

Page 29

PART V

GENERAL PROVISIONS FOR ALL ZONES

SCOPE

1. a) No building or structure shall hereafter be erected or altered...unless a development permit has been issued and no development permit shall be issued unless all the provisions of this By-law are satisfied.

...

Page 32

...

ONE MAIN BUILDING ON A LOT

16. No person shall erect more than one (1) main building on a lot except for:

a) buildings located in the General Commercial (G-C)...

...

Page 35

...

PARKING REQUIREMENTS

22. For every building or structure to be erected...off-street parking located within the same zone as the use and having unobstructed access to a public street shall be provided and maintained in conformity with the following schedule:

Page 36

Type of Building	Parking Required

...

f.	hotels, staff houses, motels, tourist cabins	one (1) parking space per suite or rental unit plus one (1) additional parking space for each fifty (50) square feet of floor area devoted to public use (taverns, restaurants and auditorial) exclusive of lobbies and halls

...

l.	all other commercial uses	one (1) parking space for each three hundred (300) square feet of commercial floor area.

...

STANDARDS FOR PARKING AREAS

23. Where parking facilities for more than four (4) vehicles are required or permitted, the parking area shall be maintained with a stable surface that is treated to prevent the raising of dust or loose particles.

...

Page 44

PART VIII

GENERAL DEVELOPMENT (G-D) ZONE

G-D PERMITTED USES

1. The following uses shall be permitted uses in a General Development (G-D) Zone:

   [Nil applicable to this rezoning]

Page 51

PART IX

GENERAL COMMERCIAL (G-C) ZONE

G-C USES PERMITTED

1. The following uses shall be permitted in a General Commercial (G-C) Zone:

...

Hotels, motels, campground, tourist trailer parks;

...

Residential uses accessory to any main use permitted in the G-C Zone;

...

Page 52

G-C ZONE REQUIREMENTS

2. In a General Commercial (G-C) Zone, no development permit shall be issued except in conformity with the following requirements:

Minimum Lot Area	20,000 square feet
Minimum Lot Frontage	100 feet
Minimum Front Yard	40 feet
Minimum Rear Yard	40 feet
Minimum Side Yard	30 feet
Maximum Height of Main Building	35 feet

NOTE: The Department of Health may require lot sizes greater than those listed here for on-site sewage disposal.

SPECIAL RESTRICTIONS: ABUTTING ZONE REQUIREMENTS

3. Where a General Commercial (G-C) Zone abuts a residential, institutional or recreational use in the General Development (G-D) Zone, the following special restrictions shall apply to an abutting yard within the General Commercial (G-C) Zone:

...

Page 76

PART XIX

ADMINISTRATION

BATES and SCHUHLEIN v. TOWN OF NEW GLASGOW

PLANNING - REZONING - REFUSAL TO REZONE R-2 TO R-3 TO PERMIT 24 CONDOMINIUM TOWNHOUSES - BOARD DECISIONS.

B & S applied to rezone unserviced vacant land to permit 24 two-bedroom condominium townhouses. Draft M.P.S. awaiting Ministerial approval. Under M.P.S. development agreement would be required.

HELD: Appeal allowed.

Proposal is in best interests of the Town. The development is compatible in scale, residential use and population density with the surrounding developed area. The Board need not necessarily follow previous decisions.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **WILLIAM BATES** of Scotsburn, Pictou County, and **WARREN SCHUHLEIN** of Eureka, Pictou County, Nova Scotia, from a decision of the Council of the **TOWN OF NEW GLASGOW** made January 23, 1989, refusing to rezone lands off Dalcrombie Drive, New Glasgow, from Residential (R2) Zone to Residential Multiple Family (R3) Zone to permit construction of twenty-four, two bedroom condominium units by the Applicants.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: JOHN LANGLEY, Q.C., on behalf of the Appellants, William Bates and Warren Schuhlein;

DAVID WALLACE, on behalf of the Respondent, Town of New Glasgow;

RODD SANDALL, ESQ., an interested person on his own behalf and on behalf of an interested citizens' group.

HEARING DATES: April 12, 1989
April 13, 1989.

DECISION RENDERED: May 24, 1989.

DECISION: **Appeal allowed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, c. 9. This is an appeal from the refusal decision of the Town Council of the Town of New Glasgow to rezone certain lands from Residential (R2) to Residential Multiple (R3) Zone.

The Appellants, **WILLIAM BATES** and **WARREN SCHUHLEIN** are the Applicants for the rezoning. They are also the Appellants in this appeal. They are joint owners of Lot A-1 of a subdivision between Dalcrombie Drive and Herbert Street Extension in the Town of New Glasgow. They wish New Glasgow to rezone this property of some 83,694 square feet from its present R2 to Residential Multiple (R3) in order that they may build twenty-four two-bedroom townhouse condominium units and to service those units with sewer and water from Cameron Avenue through Herbert Street Extension.

Town Council turned down their request to rezone on January 23, 1989.

The Appellants' Notice of Appeal, was dated February 7, 1989, stamped received by the Board on February 10, 1989.

No one objected to the jurisdiction of the Board to hear this planning appeal. The Board determines, on the evidence before it, that it had jurisdiction to proceed with the appeal.

The Board also determined that Rodd Sandall, qualified as an "interested person" within the meaning of Section 27(4) of the **Municipal Board Act**, S.N.S. 1981, Chapter 9. He represented himself as a homeowner in the area concerned, as well as purporting to represent a body of other homeowners in the general area.

The Board seeing a crowd of over 30 people in the hearing room inquired as to the advisability of holding an evening meeting in order that unrepresented citizens who were not parties would be able to express their views. The Board held a 7:00 p.m. meeting and many of these people appeared and gave evidence before the Board pursuant to Section 27(3) of the **Municipal Board Act**.

The Appellants applied to the Town to have the lands described in Schedule "D" to this Decision rezoned from R2 which is the serviced residential zone in the Town of New Glasgow, (this zone generally permits single family residences and duplexes and side-by-sides rezoned) to R3 for the purpose of constructing twenty-four, six room, two-bedroom condominiums.

The land has frontage on a paved and used public street on its northern side on Dalcrombie Drive. The frontage on this street is roughly one lot in size. The south side of the property (the south boundary of the land) lies, generally one building lot deep, north of Cameron Avenue. There is however again a possibility of street frontage on an undeveloped Herbert Street Extension which runs northerly from Cameron Avenue one lot until it meets the southern boundary of the Appellants' land.

The subject land, Lot A-1, is essentially the centered undeveloped portion of a block with its northern boundary formed by Dalcrombie Drive, its eastern boundary formed by Abercrombie Drive, its southern boundary formed by Cameron Avenue, the western boundary of the block is Beech Street.

The original block of land of which this Lot A-1 forms the residue originally had a large frontage on Abercrombie Road.

The entire lot was bought by the Mormon Church. The Church used approximately one-half the land (being that portion fronting on Abercrombie Road) for development of a large Church and parking area to support the Church. South of Lot A-1, with the exception of the Herbert Street Extension vacant lot, there are single family houses. To the west of Lot A-1 are single family houses on Cameron Avenue, Dalcrombie Drive and Beech Street. In the northeast corner are some R3 lots on Dalcrombie Drive and in fairly close proximity to the subject land.

New Glasgow does not have a Municipal Planning Strategy in force. It does have a Land Use By-law in force. Excerpts from a draft M.P.S. are attached in Schedule "A" to this decision. Excerpts from the Land Use By-law in force are enclosed in this decision. The Land Use By-law has been preserved in force by virtue of Section 112(1) of the **Planning Act** by a Ministerial Order which expires May 31, 1989.

Under Section 16(1), the **Municipal Board Act**, the Chairman assigned Board Member, Richard L. Weldon, to hear this appeal.

The Board heard this appeal at its 10:00 a.m. sittings on April 12, 1989, at the Town Council Chambers, Provost Street, New Glasgow, Nova Scotia. The Board viewed the site. The Board heard argument from all parties subsequent to the hearing and the Board also conducted an evening session to hear the citizens who were not joined as parties. These were persons who wished to speak but did not wish to be joined as parties.

Those giving evidence under oath were Basil Vance MacLeod, Warren Schuhlein, Robert Funke, William Bates, Pearl Grace Mills, Beverley MacDonald, Anne Moore, Colin MacDonald, Jim Crockett, James Langille, Roderick MacIntyre, Michael MacIntyre, Alvin Sinclair, James Gordon Proudfoot, William H. Sutherland, John Samuel Pink, Shawn MacDonnell, and James Daniel MacLeod.

Other than the citizens testifying, the Appellants called most of the witnesses including members of the Council and members of the P.A.C. The Developers' proposal was to have the land rezoned to R3 to give public access to the property by punching a road south from Dalcrombie Drive ending in a cul-de-sac. He proposed to build this new road to the Town's standards and to build four blocks of two-bedroom condominiums around this road that he punched into the center of the land. He proposed to drain the land and use the sewer and water services through Herbert Street Extension until it connected with the connecting sewer and water lines on Cameron Avenue.

The Appellants felt there was a need for a different mixture of housing in the Town. They felt there was a market for condominiums. Although the nearest local condominium was located in Pictou, they were not concerned with the large vacancy rate which appears in rental housing. They proposed to phase this condominium by first building one six-unit structure and then constructing the others as the demand arose.

The Appellant Bates is an employee of the Mormon Church. The land was purchased from the Church on favourable conditions and terms without tender.

Mr. Schuhlein, on the evidence before the Board, appears to be the building contractor/developer who is actively promoting this proposal.

The two gentlemen are obviously in a joint venture to develop these lands.

The lands were not sold without recourse by the Church. The Church imposed certain restrictive covenants on the land for the protection of the adjacent Church property.

Town Council has made no commitment to the Developers to allow them to hook up sewer and water through the Herbert Street Extension. This is the most logical way, according to the Town Engineer, to service this property with sewer and water.

All parties agreed and advocated to the Board that this was a separate issue unrelated to the rezoning of this lot. [The Board finds it difficult to accept the logic that a Council which would unanimously turn down the rezoning would later approve, by majority, if the rezoning were imposed the joining up with the sewer and water systems that are separated by Town-owned property from the nearest sewer line.] Despite the concern of the Board, all the parties and all the witnesses assured the Board that this is not a real issue.

The Board therefore takes note of the fact that in unfortunate circumstances the sewer and the water could be pushed back up through the road that the developer must punch south. Perhaps other arrangements could be made, using the existing grades, to drain the property through the Church parking lot onto Abercrombie Drive should the Town be reluctant to allow access across the Herbert Street Extension.

The Board makes no finding since it has insufficient evidence and argument before it on whether or not the developer is entitled as of right to use the land area of Herbert Street Extension to connect up with the Town sewers on Cameron Avenue.

The only expert planner to testify before the Board testified that he recommended to Council that they approve the rezoning. He testified that, in his view, the rezoning was in the best interests of the Town.

Many municipal politicians and P.A.C. Committee members testified before the Board. They supported their previous decision to turn down the rezoning at all levels of decision on the grounds that there was an M.P.S. before the Minister for approval and that they expected Ministerial approval to come by June 30, 1989.

Under this draft M.P.S. Town Council would be able to approve the Developer's proposal by way of development agreement. The only way this proposal could proceed under the new M.P.S., is by way of development agreement. Under development agreement, there is usually more detailed control available to the Town. The Town can hold the developer to certain narrower criteria than under the general zoning by-laws now in force.

Many of the witnesses, other than the developers themselves, expressed concern about the economic viability of this scheme to build condominiums. If condominiums were not marketable in New Glasgow, the people who spoke against this proposal before the Board were concerned that the R3 zoning would be used in a "worst case scenario". They felt that ordinary apartment dwellings to the maximum number of units would be built if construction of condominiums proved economically unsuitable.

No one directly addressed the concern that under the existing L.U.B., (with the construction of a longer section of road including the construction of the Herbert Street Extension) the land could be built to almost as many duplex units as there are going to be individual condominium units.

There is an apparent front footage limitation which will limit the number of units that can be built on this land and as well a square footage limitation which would limit the R3 use in any event.

The apparent economy to the developers in their proposal is that there is less road construction.

Some of the persons complained the traffic this development will generate will not enter onto an arterial street. The Town does not yet have a formal definition of "arterial streets". The proposed intersection would be within a block of Abercrombie Drive which everybody concerned considers a major street in the Town.

Some of the objectors said that the Herbert Street Extension should be extended directly through the property and out until it meets Dalcrombie Drive. They would not object to the development if this were done and the land were then developed as R2 land. As near as the Board can tell, this land has been available for that extension for at least the last fifteen or twenty years. The Town and the owner have not chosen to act in such a manner. For at least for the last twenty years the demand has not been there to develop the land in duplexes.

The Board is unable to see why the addition of an extra twenty-four units would make this extension that much more desirable.

The Board therefore wonders whether this proposed extension is merely a ploy to discourage the change from the status quo. The status quo is, in effect, a vacant back field for the homeowners of Dalcrombie and Cameron Avenues.

The above objections are the main objections that relate to planning matters that were made by opponents to the scheme who appeared before the Board.

Mr. Langley, for the Appellants, argued most strongly that the development should proceed in accordance with the existing Land Use By-law and the amendment permitted by the **Planning Act**. He argued that the proposal should be not judged by an M.P.S. which has not yet been approved and which has been under scrutiny for "X" number of years. The M.P.S. may never be approved. It may not be approved in the form in which it is now presented. Mr. Langley most strongly urged that his project should be judged by the existing Land Use By-law and existing good planning principles.

Mr. Langley argued that, in the absence of an in-force M.P.S., the Board, in considering a Council's decision on a rezoning, should be testing that decision against good planning principles. His argument implied the section of the present **Planning Act** under which he was appealing [63(6)] was essentially the same as the appeal section of the pre-1983 **Planning Act**. Therefore cases decided by the former Provincial Planning Appeal Board under the previous **Planning Act** could have more than average usefulness in assisting the Board in the present appeal.

He cited **Lynk** v. **The County of Cape Breton** (1986) 5-B M.B.D. 667$_1$ as an authority for the proposition found first in the headnote: "If it does not constitute good planning then it is not in the best interests of the Municipality". At page 688 the decision says: "It follows that if it does not constitute good planning, then it is not in the best interests [p. 689] of the Municipality". The Board further says: "There is an onus on the Appellant to prove that Council's [p. 690] decision is inconsistent with or unnecessary for the protection of the best interests of the Municipality and it has no done so."

Lynk$_1$ also supports the planner's evidence that the decision of Council there complained of was in the best interests of the Municipality [see p. 689].

Mr. Langley argued that the planner, in his report and evidence, dealt with the Appellants' application in accordance with good planning principles and ought to be accepted by the Board as indicating what decision was in the best interests of the Town.

Mr. Langley, as well, argued that the planner's report to Council put the proper interpretation on the draft M.P.S. that has been before Council, P.A.C., the District Planning Commission and the Department of Municipal Affairs and some or all of them over many years. The report, dated January 5, 1989, dealt with "the existing Land Use By-law" and was silent concerning the draft M.P.S. Mr. Langley argued most strenuously that the draft M.P.S. was not the prevailing law - the existing L.U.B. was. Mr. Langley argued that his client's proposal should only be judged within the context of that existing law.

Mr. Langley went further. He said the Board should disregard the draft M.P.S. He cited **Astro Management** v. **City of Halifax** (1986) 5-B M.B.D. 387_2. In its headnote it says:

> "One reason is the possible imminent approval of a draft secondary planning strategy. This was an invalid element in Council's consideration. The applicant's right to have its proposed development considered only in the light of the current policy and regulatory frame work seems self-evident."

At p. 407 of the decision in **Astro**$_2$, this proposition is stated slightly differently:

> "...the possible imminent approval of a draft secondary planning strategy **which might not permit a development such as the one proposed is [p. 407]**, in the opinion of the Board, an invalid element in Council's consideration of a development agreement which at the tie of the application and of Council's decision was a **legitimate proposal meeting the intent of the policies and regulations of the MPS and Land-Use By-law in the opinion of qualified city staff.** The applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self evident." [emphasis by the present

Board].

The Appeal Division scrutinized **Astro**[2] in a chambers application to that court for leave to appeal. Macdonald J.A. decided that application in **Astro Management Ltd. v. The City of Halifax and The Nova Scotia Municipal Board** S.C.A. 01708 (December 3, 1986; unreported)[3]. Macdonald J.A. refused the application for leave. In doing so, he also made statements of his own that are germane to this appeal:

> "[p.6] The area residents or at least some of them were opposed to the development and the Board considered such opposition to be a relevant consideration.
>
> [p.9] I also agree with his submission that whether or not the development met the "needs or characteristics" of the neighbourhood is a question of fact to be determined by the Board."

Macdonald J.A. also quoted and approved of the statements of the Board quoted above.

Mr. Langley also cited **MacIntyre et al v. The Municipality of the County of Cape Breton** N.S.M.B.-576-87-P[4]. He stated this decision was in conflict with **Astro**[2] (supported by the decision of the Appeal Division in **Astro Management**[3]). He said the Board should prefer the **Astro** decisions over the **MacIntyre**[4] decision.

MacIntyre[4] dealt with a rezoning in an area of Cape Breton County where there was no M.P.S. in effect and where there was an overholding L.U.B. There was a draft M.P.S. "presently in Halifax". The planner in question had recommended against the proposed rezoning. The rezoning would not have been legally possible had the draft M.P.S. been in force. Council had approved the rezoning and some aggrieved persons appealed to the Board.

At p. 9 the Board said:

> "...the proposed M.P.S. is not the sole criterion for determining the best interests of the Municipality".

At p. 12 the Board said:

> "It is difficult to see how the comfort of his employees or the protection of his equipment can be said to be in the best interests of the Municipality unless there was evidence that the business would cease if the rezoning was not granted. In **Calnen** v. **City of Halifax** (1977) 7 P.A.D. 739, the Planning Appeal Board noted that "amendments to the zoning by-law of a spot rezoning nature, such as this case, should not be approved unless a need for change is clearly indicated by the Appellant"."

While quoting from **MacIntyre**$_4$, the Board should like to include the following quotation:

> "Reference was made...to **Power** v. **County of Cape Breton** (1986), 5-B M.B.D. 478. The Board has reviewed this decision and is of the view that the factors which led to the decision in the **Power** case are not present in this case. As a result, the Board does not accept that the decision of Council is a "strong indication of what is in the best interests of the Municipality" (**Power**, page 488) in this case."

The Board, as determined for this appeal, follows the vehemence of Mr. Langley's argument against **MacIntyre**$_4$. Before making any attempt to resolve his argument on this point or to contrast it with any other arguments made, the Board wishes to note certain other Board decisions, not otherwise cited, that seem to hover around this same problem: how to deal with draft M.P.S's.

Ethel M. Brown v. **The City of Halifax and Rose Argand #2** N.S.M.B.-13-88-P (unreported)[5] had much the same planning law underpinning as did **Astro**[2]. There was in place a city-wide M.P.S. There was in the course of preparation a Secondary Planning Strategy affecting the area which would have permitted the development as-of-right. At the relevant time City Council could only have authorized the development proposal under a development agreement since the proposal exceeded certain of the bounds of the existing L.U.B. There had been a previous Board hearing **Brown et al** v. **City of Halifax #1** (1987), 5-B M.B.D. 149[6].

On the subject of the effect of the proposed Secondary Planning Strategy, the Board had this to say:

> "[p.2] While considering the proposal, Council was also considering the adoption of the Peninsula North Secondary Planning Strategy ("PNSPS). Council later adopted the PNSPS but it did not receive Ministerial approval. (The Board hearing was adjourned pending a Court review of the Minister's refusal. The City was unsuccessful in overturning the Minister's decision.)
>
> In making its decision, Council looked at both the existing Land Use By-law and the one proposed under the PNSPS...The proposed development is deficient in the number of parking spaces required under the existing by-law but exceeds the requirements of the PNSPS...While there is still a deficiency in the number of parking spaces, Council may permit such deficiencies under a development agreement.
>
> [p.5] Policy 1.2 [of the existing city-wide M.P.S.] applies in this case...
>
> Policy 1.2 requires a consideration of both the present neighbourhood development pattern and the needs of the

> [p.6] neighbourhood. In determining the needs of the neighbourhood, it is appropriate to consider the PNSPS. While the Minister of Municipal Affairs refused to approve it, his reasons do not affect the policies applying to this development. The evidence is that under the PNSPS the proposed development could proceed. This gives some indication of the needs of the neighbourhood...
>
> [p.7] The Board is satisfied that Council's decision is reasonably consistent with the intent of the M.P.S...".

The challenge of the City to the Ministerial refusal to approve its draft PNSPS was heard in the Trial Division of the Supreme Court by Nathanson, J. in Chambers. His decision may be found in **City of Halifax** v. **The Attorney General of Nova Scotia, representing Her Majesty the Queen in the right of the Province of Nova Scotia** (1988) S.H. No. 66314 (unreported)[7].

The Board has occasion to make a decision that fell under the same PNSPS as **Brown #2**[5] in **Tony R. Blom, (M5 Advertising Limited) and Robert S. Ferguson (Raymond W. Ferguson Trust #4** v. **The City of Halifax** N.S.M.B.-31-88-P (unreported, decided April 28, 1989)[8].

In **Blom**[8] certain lands in Halifax were designated Industrial under the existing M.P.S. which designation Council clearly considered obsolete. Council had cured that obsolescence to its satisfaction by passing the PNSPS and forwarding it to the Minister for his approval. The Minister refused the proposed PNSPS in a somewhat dubious manner which prompted the City to challenge the Minister's refusal in court. **Halifax** v. **The A.G. of N.S.**[7] was the result.

Some pertinent excerpts from **Blom**[8] follow:

> "[p.5]...That issue is whether or not the decision of Council was reasonably within the intent of the M.P.S....
>
> [p.7] There was no expert planning evidence contrary to...the planner...
>
> [At pp.8 and 9 the Board tried to interpret **Astro**[2], **Brown #2**[5] and **Halifax** v. **A.G. of N.S.**[7] and then at p. 10 concluded]...
>
> Nathanson, J.'s decision makes it very clear the Board should give small consideration to the proposed City of Halifax PNSPS. The Court supported the Minister's refusal to approve the draft PNSPS. The Board therefore follows the principal [sic] extracted from **Astro Management**. Imminent approval of draft Secondary Planning Strategy is not a sound legal base for the Council's consideration. "The Applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self evident". An aggrieved person **has the same right as an applicant to have the current law applied."** [emphasis that of the Board].

As his final argument, Mr. Langley submitted that the Appellants' proposal would not be contrary to the proposed M.P.S. but would be permissible thereunder by development agreement.

Mr. Wallace referred the Board to **Power** v. **County of Cape Breton** (1986), 5-B M.B.D. 478[9] mentioned above. He argued that Council had the best views on what constituted the best interests of the Municipality. **Power**[9], he argued, was authority to instruct the Board to be reluctant to determine the best interests of the Town otherwise than Council had.

He argued that the evidence showed the decision of Council should not be interfered with by the Board as it was in the best interests of the Town.

Mr. Sandall emphasized in his argument the lack of demand for condominiums in New Glasgow, the disturbance to the neighbours in their single family dwellings the proposed development would cause and the traffic problems it would cause. He also mentioned there was adequate suitably zoned property in the Town to service the proposed development in some other location. He argued the planners' report on an earlier attempt to rezone adjacent land R-3 correctly set out the planning considerations which should govern the determination of this rezoning appeal.

As to this last point, Mr. Langley, in rebuttal, argued that the planner's report in the earlier R-3 rezoning was so old as to be obsolete in the present situation.

The evidence and the arguments seemed thoroughly to have canvassed the issues in this appeal. Some of the previous Board decisions, as well as certain case authorities decided in the courts, have been quoted already.

Before starting to determine the issues raised here, the Board wishes to bring onto the horizon some more Board decisions, not previously mentioned, which deal with the Board's duty, in making its decision, to have regard to previous decisions of the Board.

W.R. Benjamin Products Ltd. v. **The Director of Assessment** NSMB-154-87-A (unreported)[10] decided in April 21, 1988, an assessment appeal, canvassed a wide range of Board decisions and authorities on the issue and stated starting at p.

25:

> "Such arguments raise the initial question of what consideration the previous decisions of the Board should be given when the Board is making a current decision: shortly stated, in more direct terms, how much - if any at all - should the Board be bound by its prior decisions?"

From that page to p.49 of the decision in Benjamin[10] the Board attempts to wrestle with this issue. It canvasses its statutory origins, previous Board decisions, out-of-province Canadian Authorities, a text writer, some English authorities, an American authority, and some authoritative decisions of our own Supreme Court, Appeal Division.

In the course of this wrestling the Board had these comments which may have some bearing here:

> "[p.26] The Board in some of its own previous decisions has contemplated the effect of previous decisions of the Board on current Board decision making."...[after canvassing one such example where the Board did not follow a previous Board decision at p.27 said]..."and this Board does not feel the imperative to be bound by that statement in light of other precedents canvassed by the Board in this appeal."
>
> The Board, according to this decision, gives weight to previous Board decisions but is not necessarily bound by them...[in another case the Board apparently arrived at opposite results in two appeals concerning the same land and said at p.28] In this case, although the Board arrived at opposite results based on differences in facts of the two appeals, the Board in the second case followed the "reasoning" outlined in the first of the two appeals....[then]
>
> The Board was asked...to "overrule", "disregard", "distinguish", or otherwise not follow a previous Board decision ...[p.29 quoting from a Board decision]...
>
> "The Board, as well as others, should have a knowledge of those previous decisions and should thus be protected against making current decisions in ignorance

of the content of previous decisions on the same or similar topics.

In that respect, the Board (however it may be constituted in a given case) ought to aim to be informed of previous board decisions always giving them effect to the extent they are applicable to the circumstances at hand and following them when possible. In order to deviate from past decisions of the board with facts similar to the case at hand, the current board ought to see that the previous board was in error in some manner that can logically and clearly be put to paper.

Some degree of consistency, and thus certainty, in the application of the statute the Board has the duty to apply, must be the goal...."

Of the Board decisions noted above, the Board feels [the last one] offers it the most assistance in resolving the issues raised...[after considering a text of p.31 the Board says] "Professor Mullen seems to think that the persuasive effect of past tribunal decisions on present tribunal deliberations raises issues of some complexity."

...

[p.37] The Board understands why such a sorting out of apparently conflicting decisions by the Board might be of interest to the Director...[p.38] In no statute the Board has seen does this Board have a duty, or even a power, to review previous Board decisions as an assistance to the general assessment process. The Board must consider relevant previous Board decisions in the context of deciding the appeal currently before it...

[p.48] The Board sees no further need to comment on the effect of the decisions...in this appeal or to select the one...to strike down the others. The Board feels it can decide this appeal on the positive evidence...adduced before it without criticizing the techniques used by the Board, otherwise constituted, in other appeals based on other facts...

[p.49] If...those decisions are "wrong" and should be "struck down", the Board doubts that in the circumstances as set out above it is the duty of the Board to declare those decision(s) "wrong" and "strike them (it) down."

> If...the director is truly faced with irreconcilable Board rulings on matters of law perhaps his remedy would more appropriately be found at the Supreme Court, Appeal Division, level where there would seem in the view of the Board an appropriate forum for the reconciliation of conflicting statements of law by determinations of "rightness" and "wrongness" and of upholding the "right" law and of "striking down" the "wrong law". Their Lordships have both the power and the experience for such second guessing of the Board. Unless forced to by circumstances essential to deciding the case currently before it, the Board adopts the view that it has no mandate to "second guess" or "overrule" previous Board decisions: it wasn't there; the previous Board was."

In the event that one might not accept the conclusions outlined in Benjamin[10]. the Board will cite some of the seminal Appeal Division sayings contained in that decision.

The Town of Bedford v. **Armoyan Group Limited and The Nova Scotia Municipal Board** S.C.A. 01908 (decided February 12, 1988 in Chambers, unreported)[11], Macdonald J.A., in reconciling several allegedly conflicting Board decisions, says at p.8:

> "In view of the **Spinney** decision I do not think it can be said that the Board has restricted the ascertainment of the intent of an M.P.S. to a consideration only of its policies. Indeed I do not read **Oakdene** as saying that it is policies and only policies that can be considered in determining such intent. Rather, although a considerations of the policies are obligatory they are not the sole matters that may be referred to in such determination...the intent is to be ascertained by a perusal of the entire M.P.S. In my opinion even if it could be said that the Board did deviate in this case from a principle laid down in earlier cases such does not to my mind amount to an error in law or jurisdiction.
>
> Although the Board may enunciate general principles as guides for future cases it must not "fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it."...

> [p.10] The language by which Mrs. Salton expressed her conclusion was perhaps not as explicit and positive as one, in the light of hindsight might have chosen..."

The Town of Kentville v. **Laba et al** (1988) 38 M.P.L.R. 170[12] specifically supports **Armoyan**[11].

Armoyan[11] seems to the Board to have struck a sensitive balance in instructing the Board in a technique for reviewing previous Board decisions and in properly applying the lessons determinable from those decisions to the decision at hand. Macdonald, J.A., gave the previous decisions full scope. He did not find it necessary to deviate from them, yet he said deviation was permissible, if necessary, in order to ensure a full hearing of the current appeal.

With these decisions all in mind, the Board will attempt to deal with the evidence before it in the context of the main arguments made before it.

Mr. Wallace made much of Council's decision and said it accurately reflected the best interests of the Town. Section 63(6) of the **Planning Act** gives him much comfort in that respect. **Power**[9], cited by him, gives him no additional support for the Town's position. In the view of the Board, it does not apply in this case. The unanimous triumvirate present in **Power**[9] the people, the planner and the politician is lacking here: in this appeal the planner did not agree with the other two members of the triumvirate. The Board adopts, as its own position, the position of the Board in **MacIntyre**[4] when it said:

> "Reference was made...to **Power** v. **County of Cape Breton** (1986), 5-B M.B.D. 478. The Board has reviewed this decision and is of the view that the factors which led to the decision in the **Power** case are not present in this case. As a result, the Board does not accept that the decision of Council is a "strong indication of what is in the best interests of the Municipality" (**Power**, page 488) in this case."

Mr. Wallace's argument thus receives statutory support but not the case support he advocated. The jury is still out.

Mr. Sandall argued no demand for condominiums existed in the Town. Implicit in his argument was the fact that his community should not be disturbed for rezonings designed to support projects which could not, for adverse economic reasons, presently succeed. The Board, in this instance, has listened to Mr. Schuhlein's testimony. It tends to assess him as a person who has smelled the Town's economic waters and has felt that the Town, despite the high vacancy rate in multiple dwellings available to rent, has properly identified an unmet demand for the owner-occupied condominiums which he proposes to build. If the demand does not presently exist-there are none now available in the Town - the Board feels Mr. Schuhlein is the type of entrepeneur who has seen the coming of the demand and will likely work successfully to ensure its early advent. The Board accepts Mr. Schuhlein's position on the economics of the proposed condominium development.

The Board understands Mr. Sandall's argument that any development of the subject property will be destabilizing to the homeowners, especially those in single family houses surrounding most of the property. This destabilization would result as well if the property were developed to duplexes as-of-right. The population densities flowing from as-of-right R-2 development approximate those inherent in Mr. Schuhlein's proposal.

With respect, the neighbours should not be able to successfully resist change by contrasting "no development" as against "proposed development". In the Board's opinion, they should be contrasting the "proposed development" as against the "as-of-right development". They should not be allowed to say: "We like this vacant land as a **de facto** extra back yard to our own lots. We want no change." They must be prepared to accept, at least, development to that of the existing zoning.

The Board sees Mr. Schuhlein's proposal as being, in some of its effects no worse than, and in many respects superior to, a development of the subject property to as-of-right densities. The proposed cul-de-sac will limit through traffic which is implicit in the as-of-right development to its highest density.

Mr. Sandall's argument contains the seeds of the "worst case scenario" possible under the sought for R-3 zoning. This scenario contemplates, after the rezoning, that a developer would fill the area with 4-storey walkup rental apartments.

Several factors work against the Board accepting that scenario in this appeal:

1. In all planning matters there is an element of trust. See Beaufort Mader v. The Municipality of the County of Halifax

NSMB-602-87-P (unreported)[13] at p. 11:

> "A rezoning application is based to a certain extent on trust".

This is not an axiomatic given, but a semi-presumption if you will, subject to the introduction of evidence on the point of developer's trustworthiness and skill.

The evidence (knowledge) may be positive: "This guy is a good developer. He has built before. He produced good work and on time and budget." Such evidence should increase the heat shown in Council's trust thermometer.

The evidence (knowledge) may be negative: "He never keeps his word. The last time he built A after he had promised B. His work is slow, and shoddy." In such a case, Council's trust thermometer should give a cool, cool reading.

More often, Council will hear an excellent proposal- most proposals are excellent at the proposal stage - but will not have much knowledge of the honesty and capabilities to deliver of the developer concerned. With its constituents' interests in mind, Council again should find its trusty thermometer in the temperate zone: supportive if necessary, but not necessarily supportive.

And all gradation of positions in between.

There is no real negative evidence indicating these developer's fall into the second class.

There is no overwhelming evidence putting these developers into the first class mentioned. They fit, therefore, somewhere into the third class mentioned: They are entitled to a degree of trust when they say they will build condominiums for sale to owners rather than four storey walkups for rent.

Positively supporting this trust are the following facts apparent in the evidence:

i) One of the developer partners has strong ties with the adjacent church. If the church became dissatisfied with the conduct of the developers it could, if it wished, express its wishes most forcefully against its employee.

ii) On the same lines, the same church, when it sold the subject property to the developers put covenants against the land which it could utilize to influence the course of the development away from the worst case scenario, if it wished.

iii) The size of the subject property and the terms of the existing L.U.B. limit the number of units that may be placed on the subject land. Densities cannot wholly get out of hand.

iv) The economics of the Town's vacancy rate militate strongly against building multiple unit rental properties anywhere within the Town.

v) One Appellant, Mr. Bates, impressed the Board as a very straightforward person. To the extent that the evidence showed Mr. Schuhlein might be a difficult developer for the Town to rely on, Mr. Bates should be able to so exercise his influence that his obvious straightforwardness could prevail.

Negatively impacting on the trust Council should have for this developer are the following facts found in the evidence:

i) Mr. Schuhlein made no attempt to put before Council, the P.A.C. or staff the architectural drawings he borrowed from another developer in Pictou which quite graphically showed what the type of buildings he intended to produce on the subject property. These drawings were first introduced at the Board hearing.

ii) The L.U.B. requirements to density, mentioned above, constrain even the worst developer.

> iii) No prudent investor (include in that term "lender"), as mentioned above, would support an imprudent developer in developing now the subject property to rental multiple units. It makes no present economic sense to do so.

Mr. Sandall's argument as to traffic worsening is not sustained by the evidence brought before the Board.

Mr. Sandall advocated a previous planning report as superior to the one given in this case. The Board didn't see or hear from the former planner. He was not made available for cross-examination by parties in opposition to those represented by Mr. Sandall. In contrast, the present planner was before the Board and subjected to cross-examination. As pointed out by Mr. Langley, the former report concerned a rezoning refused about 8 years previously and for another piece of property. In such circumstances the Board rejects Mr. Sandall's argument that it should prefer the previous planner's report to that of the planner having the duty to inform and advise Council on the Appellants'proposal.

Does the Board have to adopt Mr. Langley's argument to determine whether or not the decision of Town Council was in the best interests of the Town?

The Board repeats the cases of **Astro**[2], **Astro Management**[3], **Halifax v. A.G. of N.S.**[7], **Blom**[8], **Benjamin**[10], **Armoyan**[11] and **Laba**[12] as outlined in some detail previously in this decision. Reading them together, the Board is of the opinion they are overwhelming authority for the proposition that the Appellants in this case are entitled to have their planning rights determined in the context of the existing legal framework, namely the existing L.U.B. of the Town and, of course, the present **Planning Act**.

Mr. Langley would have us disregard the draft M.P.S. of the Town. Insofar as it is a legally binding document, the Board, based on its readings of the authorities listed in the preceding paragraph, does so disregard the Town's draft M.P.S.

Mr. Langley would have the Board go one step further and have the Board discredit specifically the decision of the Board in **MacIntyre**[4], and, implicitly, the decision of the Board in **Brown #2**[5] since, he argued, they were in contradiction to the decisions cited just two paragraphs back.

The wordings in both these cases made them capable of the interpretation placed on them by Mr. Langley.

According to Mr. Justice Macdonald in **Armoyan**[11]:

> "The language by which Mrs. Salton expressed her conclusion was perhaps not as explicit and positive as one, in the light of hindsight might have chosen..." [and one should not judge the correctness of the decision from some wording he might not have chosen].

To look at some of the wording in **MacIntyre**[4] and **Brown #2**[5], in line with Macdonald, J.A.'s just repeated remarks (expressed and implied), without looking at all of the wording would not provide the Board here true insight into the meanings of both these recent Board decisions.

MacIntyre[4] did not rely on the draft M.P.S. as the sole basis of its decision. The Board correctly stated there was no M.P.S. [p.3] and that sections 112 and 63(6) of the **Planning Act**

governed the Board's jurisdiction and duty in the appeal. At p.10 the Board found that, except for the size of the subject property, the best use of the land was for agricultural use. The Board considered the burden was on the applicant to show his need for change was in the best interests of the Municipality which was the test the Board applied to the evidence and the decision of municipal council before it. There were other factors than the prohibition contained in the draft M.P.S. to sustain the Board's decision in **MacIntyre**$_4$ with which the present Board can find no dispute and which stand independently of the draft M.P.S. These factors encourage this Board to see there may be a more apparent than real conflict between **MacIntyre**$_4$ and the body of cases cited above. (For present convenience called the **Astro** line of cases.)

Brown #2$_5$ is entitled to the same investigation as to its meaning by this Board, as was **MacIntyre**$_4$ for the reasons stated just above. **Brown #2**$_5$ clearly used the draft PNSPS as a guide in making its determination [p.5 and ff]. It used the draft PNSPS as a source of planning information to help it determine "the needs of the neighbourhood" which apparently was the criteria the Board was required to use to test Council's decision under the existing city-wide M.P.S.

The present Board finds nothing jarring or unusual in the Board using a draft PNSPS as a source of planning information as opposed to a legal standard against which the current proposal must be tested. If that is a proper meaning to be taken from

Brown #2[5], then this Board has no need to see if **Brown #2**[5] should be discarded from the thought chain in this decision.

The **Astro** line of cases make it clear that the Board need not necessarily follow its previous decisions.

Benjamin[10]'s statement:

> "In that respect, the Board (however it may be constituted in a given case) ought to aim to be informed of previous board decisions always giving them effect to the extent they are applicable to the circumstances at hand and following them when possible. In order to deviate from past decisions of the board with facts similar to the case at hand, the current Board ought to see that the previous Board was in error in some manner than can logically and clearly be put to paper.
>
> Some degree of consistency, and thus certainty, in the application of the statute the Board has the duty to apply, must be the goal...."

is the statement on this subject that this Board endorses.

Can the **Astro** cases live with the **MacIntyre**[4] cases?

To decide this appeal, the Board will apply the following lines of reasoning:

1. As a matter of law the draft M.P.S. does not exist.

2. The proposal of the Appellants to rezone must be tested, and tested only, under the existing planning regulatory structure which in this case is the Planning Act and the Town's existing L.U.B.

3. In testing the Council's decision the Board must decide whether or not Council's decision was in the "best interests of the Town".

4. Such a determination is a determination of a matter of fact of what is primarily a planning issue which the Board can only make on the evidence before it.

5. Part of the evidence before the Board is a draft

M.P.S.

6. The draft M.P.S. has both aspects of legality and aspects of planning information, both directly factual and opinionally factually.

7. Those aspects purely legal do not exist so far as the Board is concerned when disposing of the Appellants' rights.

8. Those aspects purely planning, on the other hand, may be useful to the Board as being especially current information on land use planning.

9. Those aspects of the draft M.P.S. which have a mixed legal and planning aspect cause more trouble to the Board. To the extent the planning aspects may be intelligibly extracted from mixed portions of the draft M.P.S. the Board may consider those aspects in arriving at its decisions: at the same time the Board must disregard the legal aspects of the mixture.

10. In a mixed portion of the draft M.P.S. which cannot be intelligibly separated into its legal and planning components, the Board believes the safer practice would be to disregard any such inseparable portion of the draft M.P.S.

[The Board notes in passing that none of these mental gymnastics would be necessary if both the Municipalities and the Province would get along more quickly with their statutory duties to promptly formulate and impose M.P.S.'s. Take the "draft" out of the M.P.S.].

The Board sees acceptable guidance for its decision making in the 10 thoughts listed above. It sees nothing in the **MacIntyre**[4] line of decisions necessarily repugnant to this listing of 10 thoughts. The Board therefore sees no further need to try to resolve any apparent repugnance between the **Astro** line of cases and the **MacIntyre**[4] line of cases. If there is a problem, it is more a matter of semantics than substance. The Board sees no direct repugnance.

In this appeal the Board will take into account the draft M.P.S. in light of the 10 thoughts it has listed above.

Having done so, on the whole of the evidence the Board must determine whether the decision of Council was in the best interests of the Town.

The proposal of the Appellants is, in the opinion of the Board, in the best interests of the Town. Some of the Board's reasons have been stated elsewhere in this decision. Some of the Board's reasons are as follows:

> The Board accepts the planning opinions in that respect spoken to by Mr. MacIntyre.
>
> The Board feels that the use of the present land as proposed will meet a need perceived by the Appellants' and made necessary by the demographics, if not of the present, the near future. Futurity is implicit in planning which, in essence, is attempted reasoning to predict the future and intelligently to provide for it.
>
> The Board mentions yet again the trust element in planning which has been set out in detail elsewhere in this decision.
>
> The Board believes this development is compatible in scale, residential use, and population density with the surrounding developed area. The proposed development is at least as compatible with the surrounding developed area as any as-of-right development to duplexes would be.

Council should only approve of a proposal which is in the best interests of the Town. The Board has stated this proposal is in the best interests of the Town.

Can the refusal decision of Council also be in the best interests of the Town?

If it can be (and is), the Board cannot interfere with the Council's decision under Section 63(6) of the **Planning Act.**

On the evidence, the Board has formed the opinion that Council decided the application before it for other than good planning reasons. Thus Council's decision, on the authority of **Lynk**[1], cannot be in the best interests of the Town.

Since the proposed amendment to the Town's L.U.B. is in the best interests of the Town and the decision of Council is not, the Board, having regard for Section 63(6) of the **Planning Act**, will interfere with the decision of Council and pursuant to Section 63(4)(c) of the same act allow the appeal by instructing the Council to amend its L.U.B. in the manner requested by the Appellants.

Given the result of the appeal, the Board has not considered the Appellant's position under Section 63(7) of the **Planning Act.**

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of May, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM THE TOWN OF NEW GLASGOW MUNICIPAL PLANNING STRATEGY AND LAND USE BY-LAW -- EXHIBIT B-19

DRAFT SUBMITTED TO DMA
FEBRUARY 1989

Page 1

INTRODUCTION

PURPOSE

...This document contains a number of policies which Council feels reflects the values and attitudes of the public and which are intended to guide the future development of the Town.

...

The overall objective of the Strategy is to encourage the enhancement of the physical, social, and economic well-being of the residents of New Glasgow through the co-operative efforts of the residents, the business community, and the municipal council. The general intent of the Strategy is to balance the concerns and interests of all who choose New Glasgow as a place to live, to carry on a business, or to meet other needs. Accordingly, the Strategy establishes an ongoing planning framework for the orderly development of the Town.

Page 2

BACKGROUND

The Town of New Glasgow is the largest urban community in Pictou County...In a provincial context, together with the adjoining towns of Trenton, Westville and Stellarton, it is the core of the third largest urban area in Nova Scotia. The tidal East River runs approximately through the center of New Glasgow and divides the Town into the East and West sides. The centrally located George Street bridge links the two sides.

...

Today, New Glasgow is the retail service center for Northern Nova Scotia. It has two regional size malls and an active downtown core...

POPULATION

New Glasgow houses about 20 percent of the fifty thousand plus people living in Pictou County. With a population of 10,022 people (1986 census), the Town has a population density of about 3370 per square mile spread over a land mass of about 3 square miles (1900 acres).

In recent years, the population of Town has declined slightly; this 4.2 percent reduction represents a loss of about 422 people between 1981 and 1986...

Page 3

...

The most realistic prediction that can be made is that New Glasgow has the physical space to approximately double its population...

Page 4

ZONING HISTORY

The first New Glasgow Zoning Bylaw was adopted by Council in 1964. Until 1981 it was the primary document used by Council to regulate development and land use in the Town. An update was prepared in 1981 in order to provide Council with better controls than the original Bylaw contained. The updating was considered to be an interim step as Council had made the decision to prepare a Municipal Planning Strategy...

...

Page 7

NEW GLASGOW'S GOALS

...

These GOALS...set the framework for the objectives and policies which follow:

1. To ensure that New Glasgow remains a safe and enjoyable place in which to live and work.

2. To promote an environment in New Glasgow which is conducive to continued economic growth.

3. To ensure that new development does not adversely affect the Town's financial position.

4. To promote developments in the community which provide employment and otherwise meet the needs of Town residents.

Page 8

RESIDENTIAL DEVELOPMENT

RESIDENTIAL NEIGHBOURHOODS

...

...residential areas should be the preserve of residential uses...

Page 9

...

OBJECTIVE 1

It is desirable that the visual and social character of existing residential neighbourhoods be protected and enhanced.

Page 10

...

POLICY R-2:

Council shall encourage "infill" housing on existing vacant, serviced lots by including provisions in the Land Use Bylaw which permit the use of those lots which do not meet the area or width requirements of the zones set out in the Bylaw.

...

Page 11

...

RESIDENTIAL GROWTH

Residential growth provides several social and economic benefits for the Town...There is also a significant shift away from the traditional single family home as the preferred housing option. Increasingly the demand for moderately priced condominium townhouses and apartments is being experienced in many areas...it may be

Page 12

accompanied by a demand for more apartments, both in large multi-unit buildings as well as in smaller converted structures.

...provided that the costs to the municipality, resulting from new development, can be minimized.

...

For the Town to obtain the full benefit of new development, maximum use must be made of existing municipal services...Town Council also feels that those who directly benefit from the installation of new services should bear a greater portion of the initial cost to install those services...Council's intent to prezone only those lands eligible for small minimum lot sizes, where municipal services are immediately available.

...

Page 13

POLICY R-8

The following areas of New Glasgow are deemed to be most suitable for future residential development and shall be designated RESIDENTIAL on the Generalized Future Land Use Map:

(1) existing residential neighbourhoods serviced by municipal sewer and water systems,

(2) vacant lands adjacent to existing sewer and water systems.

HOUSING TYPES

...changing consumer attitudes...have increased the demand for alternative housing accommodations...apartment dwelling units and mobile dwellings are the two most common alternatives to the conventional single dwelling home, which for many remains the first choice...

OBJECTIVE 3

It is desirable that a variety of housing types be available in New Glasgow to accommodate the different needs and desires of Town residents.

...

Page 15

POLICY R-11:

land which is designated RESIDENTIAL on the Generalized Future Land Use Map may be rezoned to RESIDENTIAL SINGLE DWELLING (R2) provided that:

(1) the site is adequately serviced by municipal water and sewer

(2) the proposal can meet all pertinent policies of this Strategy as well as the criteria for amendments to the Land Use Bylaw (Policy A-6).

POLICY R-12

...

Council shall consider proposals for the expansion of existing multiple dwellings beyond the requirements of the R2 Zone, as well as proposals for new multiple dwellings by development agreement only, in accordance with Policy R-15.

Page 16

MULTIPLE RESIDENTIAL USES

...In New Glasgow in 1986 there were 572 rental units. A vacancy survey carried out in late 1987 indicated an apartment vacancy rate of greater than 6%, which was similar to the other towns in the area. Given the proportion of the New Glasgow housing stock, which is rented (approximately 15%), this is an unusually high vacancy rate.

Such a surplus of apartments units and relatively low proportion of rental units to owned dwellings is indicative of several facts about the New Glasgow and area housing market.

The high vacancy rate...indicates an employment base that does not produce a high turnover rate.

The high vacancy rate is also indicative of an area with a very stable employment base, which supports a population seeking more permanent forms of housing...

The prevalence of traditional extended families and a rather close knit social structure characterizes the New Glasgow area. It also dampens the demand for apartments...A third factor which contributes to the rather high vacancy rate is the low quality of many rental units.

...

Page 17

...

Citizens have expressed concern over the design and maintenance of new apartment buildings and the effect they may have on the market value of surrounding homes...Council...agrees that steps should be taken to ensure that apartment buildings are buffered from surrounding single dwellings so that they will have less of a visual impact on neighbouring land uses...

Ultimately, Council recognizes the importance of providing for a mixture of housing types; and that depending on factors such as scale and density, could be reasonably accommodated virtually anywhere within the residential community. To effectively strive for an appropriate residential mix then, future development proposals shall also be evaluated on both sensitivity to the natural environment, and ability to compliment [sic] the character and scale of surrounding uses.

POLICY R-13:

Council will encourage owners of multi-dwelling developments to lessen the visual and vehicular impact on adjacent residential development through the use of landscaping and adequate parking and vehicle movement facilities. Council would note that the use of landscaping increases the attractiveness of multi-dwelling developments and sufficient on-site parking makes for "good neighbours" in residential neighbourhoods.

...

POLICY R-15:

Notwithstanding Policy R-14, it shall be the intention of Council to permit new multiple dwelling residential buildings and expansions to existing buildings in areas designated Residential only by development agreement. The allowable density of development will be evaluated on a site by site basis, but shall be limited to a maximum of forty dwelling units per acre. In considering the development agreement Council shall have regard to the following:

(1) that the design, including the scale and exterior finish of all building(s) is compatible with adjacent land uses,

(2) the potential of the proposal to adversely affect adjacent residential development,

(3) the impact of the proposed use on traffic volume and the local road system, as well as traffic circulation, sighting distances and the entrances and exits to the site,

(4) that adequate separation distances are maintained from low density residential developments and that landscaping measures are provided to minimize visual impacts,

(5) that municipal services are available to the lot on which the proposed development will be located.

(6) municipal water services have the necessary capacity and pressure to ensure adequate fire protection.

(7) the proposal can meet all pertinent policies of this Strategy as well as the criteria for amendments to the Land Use Bylaw (Policy A-6), Policy

...

Page 57

STORM AND SANITARY SEWERS

Ideally, storm sewer systems should be installed with new development...

...combined storm and sanitary sewers...must now be ended.

...

Page 59

...POLICY S-5:

It shall be the intention of Council to maximize the use of existing sanitary sewer and treatment facilities by directing new growth to those areas where services are available...

...

Page 62

TRANSPORTATION

ROAD NETWORK

To the present time, there has been no official classification of the majority of roads and streets in New Glasgow...Council feels a system must be adopted which designates each street by its capacity to carry increased traffic and by its ability to efficiently and safely move traffic.

...

...This system shall designate each street or road as one of the following:

(1) Local Street

(2) Collector Street

(3) Arterial Road

(4) Highways

...

Page 63

Until such time that a street classification system is developed, Council, in the case of a Land Use Bylaw amendment or application for development agreement, will rely on the recommendations of its professional staff resources to determine the appropriateness of proposed developments; and in the Subdivision Bylaw in determining the suitability of the proposed road layout.

...

Page 78

IMPLEMENTATION

GENERAL

...

...Council has established, by resolution, a Public Participation Program in accordance with the Planning Act (section 34) and specific procedures to process applications to amend the Municipal Planning Strategy and Land-Use By-law. Specific efforts will be made to maintain and enhance community awareness and participation in the ongoing planning process.

GENERALIZED FUTURE LAND-USE

The Generalized Future Land-Use Map sets out...generalized land designations...include:

(1) Residential

...

(6) Future Redevelopment

...

Page 83

DEVELOPMENT AGREEMENTS

The following uses shall only be considered subject to the entering into of a development agreement...

(1) Within the Residential Designation:

a) multi-dwelling residential developments

...

Page 84

...

A development agreement shall not require amendment to the Land-Use By-law but shall be binding upon the property until the agreement or part thereof is discharged by the Town. In considering development agreements under Section 67 of The Planning Act, 1983, in addition to all other criteria as set out in various policies of this plan, Council shall have regard to the following matters:

(1) that the proposed amendment is in conformance with the intent of the Municipal Planning Strategy and the requirements of the Land-use By-law and all other Town By-laws and regulations;

(2) that the proposal is not premature or inappropriate by reason of:

a) the financial capability of the Town to absorb any costs related to the development;

b) the adequacy of municipal sewer and water services, or if services are not provided, the adequacy of the physical site conditions for private on-site sewer and water systems;

c) the adequacy of street networks in, adjacent to and leading to the development;

d) the adequacy, capacity and proximity of schools, recreation and other community facilities;

e) adequacy of municipal fire protection services and equipment.

(3) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby Land-uses by reason of:

a) the type of use;

b) the height, bulk and lot coverage of any proposed buildings or structures;

c) traffic generation;

d) access to and egress from the site and the distance of these from street intersections;

e) parking;

f) open storage;

g) signs;

h) the hours of operation;

Page 85

i) maintenance of any building(s) and property and;

h) any other relevant matter of planning concern.

(4) the suitability of the proposed site in terms of steepness of grades, soil and/or geological conditions, and the relative location of watercourses, marshes, swamps, or bogs.

(5) the terms of the agreement provide, as appropriate, for:

a) the discharge of the agreement or parts thereof upon the successful fulfillment of its terms;

b) the renegotiation of the terms of the agreement;

c) the posting of a performance bond to ensure compliance;

d) the renewal of the agreement and;

e) penalties for lack of compliance.

...

NOTE: **The subject lands fall within the residential designation on the G.FLUM enclosed with this draft M.P.S.**

The author of this decision is not bothered to proceed further with the draft L.U.B. for New Glasgow.

SCHEDULE "B"

EXCERPTS FROM TOWN OF NEW GLASGOW LAND-USE BY-LAW UPDATED JANUARY 1, 1986 - TO DATE ---EXHIBIT B-7

Unnumbered Page

...A by-law to regulate the use of land and the erection or use of buildings and structures, and to regulate the height, bulk, location, size, spacing, character and use of buildings and structures, within the Town of New Glasgow.

...

Page 1

...

PART 2 DEFINITIONS

...

7. Building means any structure...

...

Page 2

...

14. Dwelling means a building, occupied or capable of being occupied as a home, residence or sleeping place by one or more persons...

15. Dwelling Unit means one or more habitable rooms designed or intended for use by one or more individuals as an independent and separate housekeeping establishment in which separate kitchen and sanitary facilities are provided...

...

Page 5

29. Lot means any parcel of land described in a deed or as shown in a registered plan of subdivision.

...

32. Through Lot means a lot bounded on two opposite sides by

streets or highway provided, however, that if any lot qualifies as being both a Corner Lot and a Through Lot as hereinbefore defined, such lot shall be deemed to be a Corner Lot for the purpose of this By-law.

33. Lot Area means the total horizontal area within the lot lines of a lot.

...

35. Lot Frontage means the horizontal distance between the side lot lines, such distance being measured perpendicularly to the line joining the middle of the front lot line with either the middle of the rear lot line or the apex of the triangle formed by the side lot lines and at a point therein equal in distance to the minimum applicable front yard. In the case of a corner lot with a daylighting triangle the exterior lot lines (street lines) shall be deemed to extend to their hypothetical point of intersection for the purpose of calculating the frontage.

...

37. Front Lot Line means the line dividing the lot from the street; in the case of a corner lot the shorter boundary line abutting the street shall be deemed the front lot line and the longer boundary line abutting the street shall be deemed the side lot line and where such lot lines are of equal length the front lot line shall be either of the lot lines. In the case of a through lot, any boundary dividing the lot from a street shall be deemed to be the front lot line.

...

Page 6

...

44. Maximum Lot Coverage means that percentage of the lot area covered by all buildings above ground level, and shall not include that portion of such lot area which is occupied by a building or portion thereof which is completely below ground level, and for the purpose of this definition the maximum lot coverage in each zone shall be deemed to apply only to that portion of such lot which is located within said zone.

...

49. Parking Area means an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, customers or residents and which has adjacent access to permit ingress or egress of motor vehicles to a street or highway by means of

driveways, aisles or manoeuvring areas where no parking or storage of motor vehicles is permitted.

Page 7

...

53. Rowhouse or Townhouse Dwelling means a building that is divided vertically into three or more dwelling units, each of which has independent entrances, to a front and rear yard immediately abutting the front and rear walls of each dwelling unit.

...

Page 8

58. Street or Road means the whole and entire right-of-way of every highway, road, or road allowance vested in the Province of Nova Scotia or the Town of New Glasgow.

...

63. Triplex Dwelling means a building that is divided horizontally into three dwelling units, each of which has an independent entrance either directly or through a common vestibule.

...

Page 10

PART 3

ZONES AND ZONING MAPS

1. ZONES

For the purpose of this By-law...New Glasgow is divided into the following zones...

Zones	Symbol
...	
Residential Single Family	R2
Residential Multiple Family	R3
...	

1. ZONING MAPS

Schedule "A", attached hereto may be cited as the "Zoning Map" and is hereby declared to form part of the By-law.

...

Page 12

CERTAIN WORDS

In this By-law, words used in the present tense include future; words in the singular number include the plural; words in the plural include the singular number; and the word "used" includes "arranged", "designed or intended to be used"; the word "shall" is mandatory and not permissive.

PART 5 GENERAL PROVISIONS FOR ALL ZONES

SCOPE

1. 1. No building or structure shall hereafter be erected or altered, or the use of any building changed, unless a development permit shall be issued unless all the provisions of this By-law are satisfied.

...

FRONTAGE ON STREET

2. 1. No development permit shall be issued unless the lot or parcel of land intended to be used or upon which the building or structure is to be erected abuts and fronts upon a public street.

...

Page 18

ONE MAIN BUILDING ON A LOT

20. No person shall erect more than one (1) main building on a lot except for:

...

c) grouped dwellings located in a Residential Multiple (R3) Zone; and

...

Page 20

...

PARKING REQUIREMENTS

26. For every building or structure to be erected or enlarged, off-street parking located within the same zone as the use and having unobstructed access to a public street shall be provided and maintained in conformity with the following schedule:

TYPE OF BUILDING	PARKING REQUIRED
a) A dwelling containing not more than two (2) dwelling units	One (1) parking space(s) for each dwelling unit.
b) All other dwellings	One and one half (1.5) parking space(s) for each dwelling

Page 21

...

Page 22

...

STANDARDS FOR PARKING AREAS

27. Where parking facilities for more than four (4) vehicles are required or permitted:

a) the parking area shall be maintained with a stable surface that is treated to prevent the raising of dust or loose particles;

b) the lights used for illumination of the parking lot or parking station shall be so arranged as to divert the light away from streets, adjacent lots and buildings;

...

d) the parking area shall be within three hundred (300) feet of the location which it is intended to serve, and shall be situated in the same zone;

e) when the parking area is of a permanent hard surfacing, each parking space shall be clearly demarcated and maintained as such;

...

g) approaches or driveways to any parking area, other than that required for a single family dwelling, semi-detached, or a duplex dwelling shall be defined by a curb of concrete or rolled asphalt and the limits of the parking area shall be defined by a fence, curb or other suitable obstruction designed to provide a neat appearance;

h) in addition the location of approaches or driveways shall be not closer than fifty (50) feet from the limits of the right-of-way at a street intersection;

...

Page 24

FRONT YARD FOR A THROUGH LOT

29. In the case of a through lot, the front yard shall be deemed to be any yard which abuts either of the two opposite streets.

...

Page 33

PART 7

GENERAL REQUIREMENTS FOR ALL RESIDENTIAL ZONES

...

3. For all uses in a Residential Zone, parking shall be provided on the same lot as the use in conformity with part 5, Section 26.

...

Page 36

PART 9

RESIDENTIAL SINGLE FAMILY (R2) ZONE

1. USES PERMITTED

No development permit shall be issued in a Residential Single Family (R2) Zone except for one or more of the following uses:

Single family detached dwellings
Duplex dwellings
Semi-detached dwellings

Converted dwellings (to a maximum of two dwelling units)

...

2. ZONE REQUIREMENTS

	Detached and Duplex Dwellings	Semi-Detached and Converted Dwelling
Minimum Lot Area	5,000 sq.ft.	6,000 sq.ft.
Minimum Lot Frontage	50 feet	60 feet
Minimum Front Yard	20 feet	20 feet
Minimum Rear Yard	20 feet	20 feet
Minimum Side yard		10 ft. or 1/2 the height of the main building whichever is greater
i. One side		
1 storey	6 feet	
2 or more storeys	6 feet + 2 ft. per storey over 1	
ii. Other side	6 feet	
Maximum height of main building	35 feet	35 feet

...

PART 10

RESIDENTIAL MULTIPLE (R3) ZONE

1. USES PERMITTED

No development permit shall be issued in a Residential Multiple (R3) zone except for one or more of the following uses:

All uses permitted in the R2 Zone, subject to the R2 Zone requirements
Apartment Dwellings (three or more dwelling units)
Double DuplexDwellings
Maisonette Dwellings
Row House Dwellings
Triplexes

...

2. ZONE REQUIREMENTS

In a Residential Multiple (R3) Zone, no development permit shall be issued except in conformity with the following requirements:

	Maisonette	Apartments, & DoubleDuplexes,

	Triplex Dwellings	Dwellings and Row House Dwellings	BoardingHouses, TouristHouses, Rooming Houses
Minimum Lot Area	6,000 sq.ft.	2,500 sq.ft. for each unit	1500 sq.ft. for each dwelling unit
Minimum Lot Frontage	60 feet	25 ft/unit	80 feet
Minimum Front Yard	20 feet	20 feet	20 feet
Minimum Rear Yard	20 feet	20 feet	20 feet
Minimum Side Yard	10 ft. or 1/2 the height of the main building whichever is greater.	10 ft. or 1/2 the height of the main building whichever is greater	10 ft. or 1/2 the height of the main building whichever is greater

3. SERVICES REQUIRED

No development permit shall be issued in a Residential Multiple (R3) zone where municipally approved piped water supply and municipal piped sanitary sewers are not available.

...

5. SPECIAL REQUIREMENTS; GROUPED DWELLINGS

Notwithstanding the R3 Zone requirements or anything else in this By-law, the following special provisions shall apply to grouped apartment, maisonette and row-house dwellings:

a) the minimum distance between grouped dwellings shall be 20 ft. or 1/2 the height of the higher of the two buildings, whichever is greater; and

b) the maximum number of units in a rowhouse dwelling shall be six (6).

...

7. MAXIMUM DENSITY OF DEVELOPMENT

No development permit shall be issued for apartments, maisonette dwellings, or row house dwellings in a R3 Zone where the maximum density of development exceeds 15 dwellings units per acre.

...

SCHEDULE "C"

LIST OF AUTHORITIES OF PREVIOUS BOARD DECISIONS

1. **Lynk** v. **The County of Cape Breton** (1986) 5-B M.B.D. 667

2. **Astro Management** v. **City of Halifax** (1986) 5-B M.B.D. 387

3. **Astro Management Ltd.** v. **The City of Halifax and The Nova Scotia Municipal Board** S.C.A. 01708 (Dec. 3, 1986; unreported)

4. **MacIntyre et al** v. **The Municipality of the County of Cape Breton** N.S.M.B.-576-87-P (unreported)

5. **Ethel M. Brown** v. **The City of Halifax and Rose Argand #2** N.S.M.B.-13-88-P (Vice-Chairman Garber, unreported)

6. **Brown et al** v. **City of Halifax #1** (1986), 5-B M.B.D. 149

7. **City of Halifax** v. **The Attorney General of Nova Scotia, representing Her Majesty the Queen in the right of the Province of Nova Scotia** (1988) S.H. No. 66314 (unreported)

8. **Tony R. Blom, (M5 Advertising Limited) and Robert S. Ferguson (Raymond W. Ferguson Trust #4** v. **The City of Halifax** N.S.M.B.-31-88-P (unreported, decided April 28, 1989)

9. **Power** v. **County of Cape Breton** (1986), 5-B M.B.D. 478

10. **W.R. Benjamin Products Ltd.** v. **The Director of Assessment** N.S.M.B.-154-87-A (unreported)

11. **The Town of Bedford** v. **Armoyan Group Limited and The Nova Scotia Municipal Board** S.C.A. 01908 (decided February 12, 1988 in Chambers, unreported)

12. **The Town of Kentville** v. **Laba et al** (1988) 38 M.P.L.R. 170.

SCHEDULE "D"

ALL AND SINGULAR that certain lot, piece, parcel or tract of land situate, lying and being on the eastern side of Dalcrombie Drive, in the Town of New Glasgow, County of Pictou, Province of Nova Scotia, and being Lot A1 as shown on a plan of subdivision of lands of The President of The Lethbridge Stake dated August 24, 1988, drawn by George Sellers, Nova Scotia Land Surveyor Acadia Surveys Limited and which lot may be more particularly described as follows:

BEGINNING at a survey marker placed on the southern boundary line of lands of Paul Fougere & Lana Fougere at the northwest corner of Lot A2, lands being retained by The President of The Lethbridge Stake and which survey marker is distant six hundred eighteen decimal nine two feet (618.92') on a bearing of south thirty-three degrees thirty-four minutes twenty-three seconds west from Nova Scotia Control Monument Number 3425.

THENCE to run along the western boundary line of Lot A2 on a bearing of south fifteen degrees forty-one miutes forty-seven seconds east three hundred seventy-three decimal eight nine feet (373.89') to a survey marker placed on the northern boundary line of lands of Douglas Wong & Margaret Wong.

THENCE to run along the northern boundary line of lands of Douglas Wong & Margaret Wong, Herbert Street, lands of Marie Chediac, lands of William Bond & Mary P. Bond and lands of John Roger Swarbrick & Ann Swarbrick on a bearing of south seventy-four degrees twenty minutes thirty seconds west three hundred twenty-one decimal nine two feet (321.92') to a survey marker found at the southeast corner of Lot 14, lands of William Patrick Callaghan & Shirley Ann Callaghan.

THENCE to run along the eastern boundary line of Lot 14 and Lot 13, lands of James Kenneth Crockett & Frances Isobel Crockett on a bearing of north ten degrees fifty-four minutes thirty seconds east two hundred ten decimal three zero feet (210.30') to a survey marker placed at an angle in the southern boundary line of lot 12, lands of Larry Wayne MacLeod and Robyn Heather MacLeod.

THENCE to run along the southern boundary line of Lot 12 on a bearing of north seventy-two degrees thirty-seven minutes thirty seconds east eighty decimal zero zero feet (80.00') to a survey marker found at the southeast corner of Lot 12.

THENCE to run along the eastern boundary line of Lot 12 on a bearing of north thirteen degrees forty-four minutes thirty seconds west thirty seven decimal seven zero feet (37.70') to a survey marker found at the southeast corner of Lot 11, lands of Harvey Styles & Sheila Styles.

THENCE to run along the eastern boundary line of Lot 11 on a bearing of north seventeen degrees twenty-two minutes thirty seconds west forty-eight decimal zero seven feet (48.07') to a survey marker found at a point of curve on the eastern boundary line of Lot 11.

THENCE to continue along the northeastern boundary line of Lot 11 along an arc of a curve to the left in a northwesterly direction, which curve has a radius of one hundred twenty decimal zero zero feet (120.00'), for an arc distance of one hundred nine decimal eight nine feet (109.89') to a survey marker found at the end of a curve on the northern boundary line of Lot 11.

—/2

THENCE to continue along the northern boundary line of Lot 11 on a bearing of north sixty-nine degrees fifty minutes thirty seconds west twenty decimal zero zero feet (20.00') to a survey marker found on the eastern boundary line of Dalcrombie Drive.

THENCE to run along the eastern boundary line of Dalcrombie Drive on a bearing of north twenty degrees zero nine minutes thirty seconds east fifty decimal zero zero feet (50.00') to a survey marker found at the southwest corner of lands of Harold E. Mills & P. Grace Mills.

THENCE to run along the southern boundary line of lands of Harold E. Mills & P. Grace Mills. on a bearing of south sixty-nine degrees fifty minutes thirty seconds east twenty decimal zero zero feet (20.00') to a survey marker found at the beginning of a curve on the southern boundary line of lands of Harold E. Mills & P. Grace Mills.

THENCE to continue along the southern boundary line of lands of Harold E. Mills & P. Grace Mills along an arc of a curve to the right in an easterly direction, which curve has a radius of one hundred seventy decimal zero zero feet (170.00') for an arc distance of forty decimal zero five feet (40.05') to a survey marker found at an angle in the southern boundary line of lands of Harold E. Mills & P. Grace Mills.

THENCE to continue along the southern boundary line of lands of Harold E. Mills & P. Grace Mills and along the southern boundary line of lands of Paul Fougere & Lana Fougere on a bearing of north seventy-eight degrees sixteen minutes thirty seconds east one hundred thirty-nine decimal one nine feet (139.19') to the place of beginning.

A LOT OF LAND containing an area of eighty-three thousand six hundred ninety-seven square feet more or less. (83697 sq. ft. ±).

ALL bearings are Grid and are referenced to a Central Meridian of sixty-one degrees thirty minutes west.

HATTIN v. TOWN OF BEDFORD AND BEDFORD VILLAGE PROPERTIES

PLANNING - DEVELOPMENT AGREEMENT - APPROVAL TO PERMIT APARTMENT BUILDINGS AND TOWNHOUSES - SHADOWING - BUFFERING - QUALITY OF LIFE - TOWN OF BEDFORD M.P.S. POLICIES R-6, Z-4.

This is an appeal by R.H. from a decision of Bedford Town Council approving the entering into of a development agreement to permit 84 condominium apartments in 7 buildings, 47 condominium townhouses and 24 freehold townhouses. Appellant resides in adjoining phases of same subdivision and argued this project would impact on his quality of life due to density, buffering, traffic and school overcrowding and should be developed as R-1.

HELD: Appeal dismissed.

Under formula used by School Board, more students would be generated if developed under R-1. Proposed density does not exceed maximum permitted under M.P.S. Proposed apartment complex seems designed in order to reduce incompatibility. Issue of buffering and screening was thoroughly reviewed by Council. Development will act as a buffer between higher density adjacent development and remaining R-1 homes. Shadowing could be considered a nuisance factor under M.P.S. criteria. Quality of life is very subjective term.

NSMB-7-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, by **RICHARD HATTIN** from a decision of **BEDFORD TOWN COUNCIL** made February 13, 1989, which approved entering into a development agreement with **BEDFORD VILLAGE PROPERTIES LTD.** to permit condominium townhouses, freehold townhouses and multi-family housing on an 11-acre site on the south side of Moirs Mill Road.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: RICHARD HATTIN, on his own behalf;

ROBERT MURRANT, Q.C. and SUSAN ALLEN, LL.B., on behalf of the Town of Bedford;

ROBERT GRANT, LL.B., on behalf of Bedford Village Properties Ltd.,

ROSS STINSON, LL.B. and JAMES BOUDREAU, LL.B., on behalf of the Interested Person, Granbury Developments Ltd.

HEARING DATES: April 27, 1989
April 28, 1989
May 1, 1989
May 2, 1989
May 10, 1989.

DECISION DATE: June 2, 1989.

DECISION: **Appeal dismissed.**

DECISION

Bedford Village is a residential subdivision on the Halifax side of the Town of Bedford. Bedford Village Properties

Ltd. is developing the subdivision in phases.

Bedford Village Properties applied to the Town in late August, 1988 for a development agreement for Phase 4, an eleven acre site. Town Council approved the entering into a development agreement on February 13, 1989. The proposed development has 3 components:

1) 84 condominium apartment units in 7 buildings;

2) 47 condominium townhouse units;

3) 24 freehold townhouse units.

Mr. Richard Hattin on February 24, 1989, appealed Council's decision to the Municipal Board. Mr. Hattin resides in Phase 3a of Bedford Village.

Bedford Village Properties conveyed a portion of Phase 4 to Granbury Developments Ltd. to build the proposed apartment buildings. Granbury applied to the Board and was granted status as an "interested person" under Section 27(4) of the **Municipal Board Act**.

After Council approved the entering into of the development agreement, the developers began clearing land in the area where the apartment buildings are proposed to be built. This area is located 20 feet above Moirs Mill Road. Substantial clearing took place and local residents and Council expressed concern that the 30-foot wide buffer/setback was being disturbed. This led to further Council decisions respecting this development agreement after the February 13, 1989 approval.

At the start of the hearing, the Board heard evidence about the various Council decisions. The Board satisfied itself there was a valid decision of Council under appeal. There was some evidence that the wording of the Council's original motion was inaccurate. The Board has reviewed the subsequent Minutes of Council. The same wording was used throughout. For purposes of this appeal, the Board accepts the following as the proper wording:

> "Moved that the Town of Bedford approve in principle the entering into of a Contract Development Agreement with Bedford Village Properties Limited for the development of Lands abutting Moirs Mill Road as proposed, subject to:
>
> 1. The development to be, "phased-in," over three years;
>
> 2. That concerns respecting minimum site disturbance and the placement of sidewalks within the development be reviewed by the Director of Planning and Development Control."

The Board advertised a special evening session on April 27, 1989 to permit members of the public to make presentations. Although a number of persons attended no one wished to make a presentation.

Mr. Hattin raised a number of areas of concern including quality of life, concentration of apartment buildings, shadowing of adjacent properties, incompatibility due to density and size, lack of parkland, overcrowding in the local elementary school, inadequate information, buffering and traffic, particularly the dangerous condition of the intersection of Moirs Mill Road and the Bedford Highway.

Phase 1, 2 and 3a of Bedford Village are already developed. Each of these phases borders on Paper Mill Lake, a man-made lake and major recreational area in Bedford. Phases 1 and 3a contain single family homes as will the proposed 3b and 3c,d. Phase 2 contains single family homes, townhouses and a 30-unit apartment building.

Access to Phases 2, 3a, 3b, and 3c,d is from the Bedford Highway via Moirs Mill Road. These phases are all on the north side of Moirs Mill Road. Phase 4 is on the south side of Moirs Mill Road directly across from Phase 2 and the entrance to Phase 3a. Due to the cutting that was done to create Moirs Mill Road, Phase 4 rises to an elevation 20 feet above the road.

To the south of Phase 4 is the Nelson's Landing project which contains 158 apartments in two buildings. Approval has been given to build townhouses, a hotel and a commercial component as part of Nelson's Landing.

One of the features of Bedford Village has been the retention of much of the natural vegetation. This contrasts with Nelson's Landing where the land has been cleared for the apartment buildings.

The concept plan for Phase 4 (Exhibit H-18) shows vegetation throughout the area. The proposed development agreement requires that all disturbed site area around streets, parking areas and buildings be landscaped. In addition, the developer is to provide a "30-foot wide buffer/setback" along Moirs Mill Road and the southern property boundary.

Bedford has traditionally had a large percentage of single family homes. In 1982, when Council adopted the Municipal Planning Strategy ("M.P.S."), the percentage of single family homes was dropping. Included in the residential section of the M.P.S. was the following overall objective:

> "to make provision for high quality, mixed housing types to meet the needs of a range of income groups. Such development will be allowed to occur in areas that are economically viable and in an environment that will enhance the character of the Town and be an asset at the neighbourhood scale."

The M.P.S. established a primary area for residential development but did not prezone undeveloped land except as R-1.

The M.P.S. recognized there are problems with apartment buildings including location, density, on site amenities and compatibility with adjacent uses. Policy R-6 deals with the requirements for apartment development:

> "a) In regulating apartment development, it is the intention of Town Council to review each proposal for conformity with the Zoning By-law and not prezone any undeveloped lands in advance. Apartment buildings legally in existence at the time of this MDP being approved, will be zoned appropriately so as not to create non-conforming apartment uses.
>
> b) Provisions will be made in the Zoning By-law to control density, lot coverage, setbacks, amenity areas, parking and buffering. The location factor will be determined through the rezoning process.
>
> c) In situations where the proposal is not consistent with the zone requirements of the Zoning By-law, Council may process the proposal under the contract zoning. In assessing a proposal for an apartment development. Council shall take into consideration:
>
> > i) access to the collector or arterial road system;
> >
> > ii) the proximity to existing or proposed recreational facilities;

iii) the extent of servicing capabilities in the area;

iv) the existing or proposed school capacities;

v) that the proposal meets all other policies contained in this plan;

vi) the maximum height of any apartment building shall be restricted to seventy-five (75) feet;

vii) the density shall not exceed thirty (30) units per acre;

viii)the minimum lot size for multi-unit dwellings over three units shall be ten thousand (10,000) square feet;

ix) the general rezoning criteria found in Policy Z-4."

Policy Z-4 applies to development agreements:

"It shall be the policy of Town Council in considering zoning amendments and contract zoning, in addition to all other criteria as set out in various policies of this plan, to have regard to the following matters:

1) That the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;

2) That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk and scale of the proposal;

3) Provisions are made for buffering, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;

4) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Town to absorb any costs relating to the development;

ii) the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private onsite sewer and water systems;

iii) precipitating or contributing to a pollution problem in the area;

iv) the adequacy of storm drainage and the effect of drainage areas on adjacent uses;

v) the adequacy and proximity of school, recreation, and any other community facilities;

vi) the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

vii) the potential for the contamination of water courses or the creation of erosion or sedimentation;

viii)impact on public access to the shorelines or the waterfront;

ix) the presence of natural, historical features, buildings or sites;

x) creating a scattered development pattern requiring extensions to trunk facilities and public services while other such facilities remain underutilized.

5. Where this plan provides for special agreements or contracts to ensure compatability or reduce potential conflicts, such agreements may relate to, but are not limited to, the following:

i) type of use, density, and phasing;

ii) emissions including air, water, and noise;

iii) traffic generation, access to and egress from the site, and parking;

iv) open storage and landscaping;

v) provision for pedestrian movement and safety;

vi) provision and development of open space, parks, and walkways;

vii) drainage both natural and subsurface and soil stability;

viii)performance bonds;

ix) the compatibility of the structure in terms of design and appearance with adjacent residential uses.

6. Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.

7. In addition to the foregoing, all zoning amendments and contract zoning agreements shall be prepared in sufficient details to provide:

i) Council with a clear indication of the nature of the proposed development; and,

ii) Permit staff to assess and determine the impact such development would have on the proposed site and the surrounding community."

Most of the issues which Mr. Hattin raised are issues which Council must consider under either or both Policy R-6 and Policy Z-4.

Steve Moir, Senior Planner for the Town, prepared a lengthy Report for Council reviewing the various provisions of the M.P.S. His first Report dated September 26, 1988 and marked "Draft", recommended against approval. His second Report dated October 25, 1988, recommended in favour of the proposed development. Between the two dates negotiations took place. The developer agreed to assume responsibility for certain matters including the widening of Moirs Mill Road to provide left and right turning lanes at the Bedford Highway and to raise the grade at the intersection by 18 inches to improve sight distances.

Policy R-6 applies only to the apartment buildings portion of the development while Policy Z-4 applies to the whole development. There is some overlapping of the criteria in the two policies. Not all of the criteria relate to concerns raised in this appeal.

The Board will deal with Mr. Hattin's concerns under specific headings. The relevant criteria will be discussed in relation to these headings.

a) Schools

The Glen Moir Elementary School serves the area for Grades Primary to Three. From Grade Four on, the students are bussed to Bedford Senior Elementary. The projected enrollment for September, 1989, for Glen Moir School shows an increase which will require the use of portable classrooms or bussing the Grade 3's to another school.

The Town contacted Dr. J. Morrison, Superintendent of Operations for Halifax County - Bedford District School Board. Dr. Morrison in his letters, included in the Appeal Record, stated that 1 and 2 bedroom apartment units have no significant impact on the schools and that 70 townhouses would probably add 35 students. If the 46 condominium townhouses are marketed to older couples whose children have left home ("empty nesters") as proposed, then he estimated that 10 to 12 elementary students would be generated from the remaining 25 townhouses.

Mr. Hattin called Frank MacCormack who is the Sub-System Supervisor of Schools in Bedford and reports to Dr. Morrison. He stated that the School Board uses a calculation of

.6 for each single family home and .3 for each multi-family, townhouse and .2 for a 3-bedroom apartment unit. Using the .3 figure, Dr. Morrison's estimates are reduced from 35 to 21 and from 10 - 12 to 8 students. If the subject property was developed for single family homes, 44 lots at .6 would generate 27 students, exceeding the number generated for the townhouses.

A site has been selected for a new elementary school. It was suggested that the Provincial policy is not to build a new school until an overcrowding situation exists. In any event, overcrowding already exists. If the property develops as of right under R-1, more students will be generated than as proposed.

b) Recreational Facilities and Parkland

Bedford Village Properties Ltd. has deeded some land to the Town in Bedford Village for recreational purposes and negotiations are underway for additional land. Phase 4 is in proximity to Paper Mill Lake, a major recreational area.

The proposed condominium apartment complex includes an outdoor swimming pool and tennis courts. There is a gazebo planned for the condominium townhouse complex. Each of the freehold and condominium townhouses have yards.

Mr. Hattin argues that the developer must provide 5% of Phase 4 as parkland. Mr. Goodspeed, the architect for Phase 4, noted that if the developer is merely required to give 5% of each phase, the Town will end up with "scraps" rather than usable park spaces. The evidence is that enough land to meet the 5%

requirement has already been deeded to the Town.

Both Policy R-6 and Z-4 refer to the "proximity" of recreational facilities. The Board is satisfied that Council has properly considered this matter.

c) Density

There was considerable evidence of the proper method to calculate density. No matter how it is calculated, the proposed development does not exceed the 30-unit per acre limit contained in Policy R-6.

d) Compatibility in Terms of Use, Bulk and Scale

Mr. Goodspeed testified that in designing the proposed site and buildings, he tried to ensure compatibility with the other Phases. Particular attention was paid to Phase 2 which contains townhouses and an apartment building. The owners of the single family homes built to their own specifications so it is difficult to base the design of the new buildings on them.

The architect attempted to reduce the bulk of the apartment buildings by placing a narrow section in the middle of each building. Bedford Village Properties has retained architectural control, although Granbury Developments will build the apartments.

The proposed agreement provides that the apartment buildings not exceed 35 feet in height which is the maximum permitted in the R-1 Zone. Policy R-6 permits apartment buildings as high as 75 feet.

The proposed apartment buildings surround the parking lot. As a result, the residents of the other Phases will not be viewing parking spaces.

Mr. Hattin in his final submission, argued that by having the rear of the apartment buildings face Moirs Mill Road, the apartment complex would not be integrated into the rest of the neighbourhood. This argument appears to contradict some of his earlier arguments but the Board will treat it as an alternative argument. In general, any houses which now border Moirs Mill Road do so from the side. Their fronts face onto a particular street which then leads into Moirs Mill Road.

The proposed apartment complex, given the topographical limitations of the site, seems designed in order to reduce incompatibility and is in accordance with the design of the rest of the Phases.

e) Buffering and Screening

The Board heard various evidence about the tree cutting on the site. One of the problems is that the 30-foot buffer/setback starts from the edge of Moirs Mill Road, not from the top of the ridge. There is only a couple of feet of setback at the top of the ridge. The developer intends to revegetate the area using retaining walls and terracing. The Board on its view of the site, noted that there were some trees cut within the 30-foot buffer as alleged by Mr. Hattin.

The issue of buffering and screening was thoroughly reviewed by Council particularly during the final meeting in which Council defeated its motion to rescind its approval.

Council has not required total screening but has included provisions to reduce the impact.

It is important to note that this development will act as a buffer between the higher intensity development of Nelson's Landing and the single family homes in the rest of Bedford Village.

f) Shadowing

Mr. Hattin raised concern about the effect of increased shadowing on properties on Moirs Mill Road from three 35 foot buildings on top of the 20 foot ridge. This issue was not addressed in the Planner's Report and it does not appear to have been raised at the Public Hearing. Mr. Hattin had prepared figures and overheads to introduce as part of his rebuttal evidence. This evidence was not introduced because all the parties agreed that the buildings would increase the shadowing. Mr. Hattin's proposed evidence did not address the effect that such shadowing would have.

The Board has reviewed Policy Z-4 and believes that shadowing could be considered a nuisance factor under clause 6 of the policy. The Board further notes Mr. Stinson's argument that the buildings may not exceed the maximum height permitted in an R-1 Zone under the Land Use By-law.

The Board takes judicial notice that each of the three proposed apartment buildings are larger than most single family homes and could be expected to have more of a shadowing effect. The potential shadowing effect does not mean, however, that

Council's decision is not reasonably consistent with the intent of the M.P.S.

g) Streets and Traffic

Moirs Mill Road is a collector street and at present there are 4 streets entering it from the north. The proposed development will have several exits on Moirs Mill Road. The developer at Town's request agreed to build a road to join Amin Street in Nelson's Landing to Moirs Mill Road. A driveway from the apartment complex exits onto the proposed Amin Street Extension. Amin Street exits onto the Bedford Highway. The developer hopes to extend Acadia Mill Drive, the entrance to Phase 3a, through the freehold townhouse area in Phase 4 and into Nelson's Landing providing another connection with Amin Street.

The intersection of Moirs Mill Road and the Bedford Highway is at present dangerous when making a left turn from Moirs Mill Road. It is dangerous because a driver cannot see over the bridge parapets on the Bedford Highway.

Plans are underway for improvements to the Bedford Highway. In addition, as part of the proposed development agreement, the developer has agreed to widen Moirs Mill Road to provide left and right turning lanes and to raise the grade 18 inches at the Bedford Highway intersection. According to John Beasy, qualified as an expert in Transportation Engineering, these improvements will rectify the existing problem.

The planned improvements to the Bedford Highway by the Department of Transportation are intended to alleviate traffic problems along the stretch of highway from Nelson's Landing to the Hammonds Plains Road. The proposed Tim Horton's and the development of the Tourist Interpretive Centre which are adjacent to the Moirs Mill Road exit will result in additional traffic problems in the area.

Policy Z-4 requires Council to have regard to whether the proposal is premature or inappropriate by reason of street networks regarding congestion and traffic hazards. By requiring the developer to improve Moirs Mill Road, it cannot be said that the proposal is premature or inappropriate by reason of traffic hazards. Given that the apartment complex as well as other Phases will have an alternative exit via Amin Street, traffic congestion is not a concern caused by this development.

If the proposed development does not proceed and the 11-acre site is developed as single family housing, the developer would not be required to fix the Moirs Mill/Bedford Highway intersection nor build the Amin extension.

The Board is satisfied that Council properly considered traffic matters.

h) Adequacy of Information

Mr. Hattin argued that all the information which is required on the application form for a development agreement had not been provided by the developer.

Policy Z-4 requires that Council and staff have sufficient detail to provide a clear indication of the nature of the proposed development and to assess the impact of the development on the proposed site and the surrounding community.

At the Board hearing, staff testified that they did have enough information to properly assess the proposed development. The Board agrees.

i) Quality of Life

In addition to the specific criteria set out in Policy R-6 and Policy Z-4, Mr. Hattin referred to the overall text of the M.P.S. He noted that the wording in the introduction is different from the overall objective previously quoted. The introduction refers to development "which preserves and enhances the quality of life". The objective uses the words "an environment that will enhance the character of the Town and be an asset at the neighbourhood scale".

Mr. Hattin tried to find some criteria for measuring quality of life. He suggested that the number of parking spaces available per dwelling unit might be such a criteria. By his calculation the average number of parking spaces per unit in Bedford Village excluding Phase 4 is 1.8 whereas in Phase 4 it is 1.5.

Quality of life is a very subjective term. What one person may consider represents quality of life can be quite different from another person. For example a person living in a city may find that the ability to walk to work rates higher than the number of parking spaces available.

The evidence of Mr. Moir is that the Town needs to provide a wider range of housing than single family homes in order to provide options for senior citizens and young people starting out. Not everyone wants or can afford the large single family homes provided in Bedford Village. There may well be persons residing in a single family home who are seeking alternative accommodations and for whom a condominium townhouse offers a quality of life by eliminating the maintenance chores associated with home ownership.

The Board believes that the proposed development will not detract from the character of the Town and that it will be an asset to the neighbourhood.

j) Concentration of Apartments

Mr. Hattin is concerned with what appears to be a concentration of apartment units in this part of Bedford. The M.P.S. is under review and the draft amendment places limits on the number of apartments within a certain radius. Mr. Hattin argues that the text of the existing M.P.S. also encourages that apartments be spread throughout the community and not concentrated in any one area.

Mr. Moir pointed out that certain parts of the Town such as Eaglewood, were developed solely as R-1 and there is no land available there for a mix of housing types. In addition the M.P.S. limits residential development within a boundary.

The Board does not find that Council's decision to permit 84 apartment units in Phase 4 causes an unacceptable concentration of apartments in that part of Bedford.

The Board is satisfied that the intent of the M.P.S. is to permit a mix of high quality housing types provided that any proposed development meets the specific requirements of Policy R-6 and Policy Z-4 of the M.P.S. and any other relevant policies.

The Board determines the proposed agreement is consistent with the intent of the M.P.S. The Board confirms the decision of Council.

The appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of June, A.D., 1989.

Linda Garber

LINDA GARBER
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD

KINGSTON ALUMINUM PRODUCTS LTD. v. TOWN OF TRURO

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-2 TO C-2 - NO SPECIFIC PROPOSAL - UNDUE HARDSHIP - TRURO M.P.S. POLICIES P-211; P-501.

The Company applied to rezone an adjacent vacant lot from residential to commercial. At time of application no specific proposal for use of lot. Local residents opposed to further extension of commercial uses in their neighbourhood. Land designated Commercial on Gen.FLUM. At Board hearing, company said it plans to tear down existing warehouse and rebuild on the new lot.

HELD: Appeal dismissed.

Council clearly did not have sufficient knowledge of applicant's proposal and could not determine whether there were controls to reduce conflict without a specific proposal. Council could not properly assess the criteria in Policy. Council could not enure a sense of security in Town if it rezoned land. The present configuration of buildings provides a clear boundary between residential and commercial uses in the area. Evidence does not establish undue hardship.

Note: Leave to appeal to the Nova Scotia Supreme Court, Appeal Division granted.

NSMB-27-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **KINGSTON ALUMINUM PRODUCTS LTD.** from a decision of the Council of the Town of Truro made November 7, 1988, refusing to rezone a lot of land located south of West Prince Street and north of the Truro Golf and Country Club from Low Density Residential Double Family (R-2) Zone to Highway Commercial (C-2) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DOUGLAS CALDWELL, Q.C., and PETER ROGERS, LL.B., for the Appellant;

DAVID GRUCHY, Q.C. and ANDREW MACDONALD, Articled Clerk, for the Town;

JOANNE STATES on behalf of the "Interested Persons" Cindy Paris, Lenore Mentis and other residents of West Prince Street.

BRIEFS SUBMITTED: June 6, 1989, by the Appellant.
June 16, 1989 by the Town and the Interested Persons.

HEARING DATES: February 20, 1989;
May 4, 1989;
May 23, 1989.

DECISION DATE: June 26, 1989.

DECISION: **Appeal Dismissed.**

DECISION

KINGSTON ALUMINUM PRODUCTS LTD. is a Truro company which distributes trailers and trailer parts, fabricates windows and warehouses building supplies for both wholesale and local retail. It has operated on the south side of West Prince Street near the intersection of Juniper Street for 20 years. There are four buildings on the property. The Company acquired the property in six lots, all but one lot from the Town.

In June, 1987, Walter Hutchinson, President of Kingston Aluminum Products Ltd., approached the Town about purchasing Lot 88KA. The lot is just under 1 acre and is located on the west side of the existing property. It is part of a larger vacant area of Town-owned land. It does not have street frontage. After a tendering process, the company acquired Lot 88KA from the Town for $15,000.00.

On August 15, 1988, Mr. Hutchinson wrote to the mayor and Town Councillors as follows:

> "I would like to make applications [sic] to rezone land on West Prince Street, Lot #88KA from R2 to C2".

Mr. Hutchinson did not provide further documentation to support the application for rezoning.

Council refused the application on November 7, 1988. Kingston Aluminum Products Ltd. appealed to the Municipal Board.

The Board scheduled the hearing for February 20, 1989 and the Appellant served the Notices of Hearing. A few days before the hearing Mr. Gruchy, Solicitor for the Town, requested an adjournment. On February 20, 1989, the Chairman adjourned the hearing without day.

The Clerk of the Board, in consultation with the solicitors for the Town and the Appellant, scheduled a hearing for May 4th and 5th, 1989. The Board did not require further advertising or service of Notices of Hearing.

On May 4, 1989, the Board learned there were members of the public who wished to participate in the hearing. They did not attend on February 20th because they were aware of the proposed adjournment They apparently did not know the hearing resumed on May 4, 1989. As a result, the Board adjourned the hearing to May 23, 1989. The Board placed an advertisement in the local paper and the Board mailed Notices of Hearing to the owners of all property within a 500 foot radius of Lot 88KA.

On May 23, 1989, Joanna States of the Black United Front applied to have the residents of West Prince Street designated as Interested Persons. The Board asked Ms. States to name at least two of the residents of West Prince Street she was representing. She named Cindy Paris and Lenore Mentis. Both the Appellant and the Town agreed that the residents had a real and substantial interest in the appeal. The Board determined Cindy Paris, Lenore Mentis and the other residents of West Prince Street were interested persons under Section 27(4) of the **Municipal Board Act.** Ms. States acted as their agent in the hearing.

Mr. Caldwell called Mr. Hutchinson and Donald Mason. The Town called no evidence. Ms. States made a presentation which included a video tape of the area adjacent to the subject property. George Clyke, a resident of Truro, and Cindy Paris, one of the Interested Persons, spoke in opposition to the rezoning.

Mr. Hutchinson testified that at the time of the application the Company wanted all uses permitted under the Highway Commercial (C-2) Zone open to it. He advised the Board that the plan now is to tear down one of the warehouses and build a new warehouse on Lot 88KA to permit the use of a forklift truck in moving goods into and out of the warehouse. At present, there is no room to use a forklift truck and current shipping methods make it necessary to have one.

The Board qualified Mr. Mason to give opinion evidence about planning matters. His evidence focussed on the intent of the Municipal Planning Strategy ("M.P.S."). He reviewed the various policies which Council cited in refusing the rezoning. It is Mr. Mason's opinion that Council should have approved the rezoning.

Lot 88KA is on the west side of the Kingston Aluminum property. The Truro Golf Club borders Lot 88KA on the south. Town owned lands are to the west. The homes of Reginald Boudreau, Brian Drummond and Carl Jones are to the north. These homes front on West Prince Street. All three owners gave written consent to the rezoning of Lot 88KA.

West Prince Street is a dead-end street. To the west of Kingston Aluminum Products Ltd. there are a number of houses on both sides of West Prince Street. These homes are all occupied by members of Truro's black community. The community is concerned that any further expansion of the commercial zoning in the area will lead to the destruction of their community.

To the east of the Kingston Aluminum property is Carter Graphics and Town-owned land. There are commercial properties located further to the east on Prince Street. There is vacant land on the north side of West Prince Street directly across from Kingston Aluminum. To the east is a driveway for the Canadian Tire Store, a Maritime Tel and Tel building and the intersection of Juniper Street and West Prince.

This is an extremely busy intersection as Juniper Street connects with Robie Street which accesses Highway 102. From time to time drivers miss the intersection and proceed along West Prince Street. This sometimes results in tractor trailers having to back down the street blocking West Prince Street.

Two of the four buildings on the Kingston Aluminum property form a border between the residential properties on West Prince Street and the commercial properties to the east. There is parking for staff on the west side of the building which borders Lot 88KA and a driveway which exits onto West Prince Street. This driveway is posted with two "DO NOT ENTER" signs but tractor trailers from time to time ignore the signs and back in the driveway blocking access to and egress from West Prince Street.

The subject property is designated on the Generalized Future Land Use Map as Commercial. It is zoned R-2.

In refusing the rezoning Town Council cited several policies from the Municipal Planning Strategy ("M.P.S.") P-211, P-235, P-236(a), P-501 and P-506. Council also cited section 4.2 of the Land Use By-law ("L.U.B."). The Board has reviewed the various policies. Policies P-211 and P-501 read as follows:

> "P-211 Therefore, it shall be a policy of Council to: Administer this plan and corresponding Zoning By-law in a judicious and expedient manner to curtail illegal land uses and to ensure a sense of security in Town.
>
> P-501 Therefore, it shall be a policy of Council to: In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> a) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and regulations;
>
> b) That the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the Town to absorb any costs relating to the development;
>
> ii) the adequacy of sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;
>
> iii) the adequacy and proximity of school, recreation, and any other community facilities;
>
> iv) the adequacy of road networks in, adjacent to, or leading to the development;
>
> v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;
>
> vi) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.

> c) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of:
>
> i) type of use;
>
> ii) emissions including air and water pollutants and noise;
>
> iii) height, bulk, and lot coverage of the proposed building;
>
> iv) traffic generation, access to and egress from the site, and parking;
>
> v) open storage;
>
> vi) signs;
>
> vii) similar matters of planning concern.
>
> d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway right-of-ways and other nuisance factors.
>
> e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

The Board interpreted Policy P-211 in Benedict v. Town of Truro (1985) 4 M.B.D. 291 as putting a positive duty on Council to ensure a sense of security in the Town when it administers the M.P.S. and L.U.B.

Policy P-501 is an implementation policy which sets out the criteria by which Council is to evaluate the specific proposal and determine whether or not to amend the L.U.B.

In his brief, counsel for the Appellant makes the following comment:

"All that is required is sufficient knowledge of the

> applicant's proposal to determine whether there are controls placed on the proposed development so as to reduce conflict with other nearby land uses."

Mr. Hutchinson's letter of application contained no details of his plans for Lot 88KA. Mr. Gruchy asked Mr. Hutchinson about his intentions at the time of the Council meeting. Mr. Hutchinson testified:

> "At that time anything that comes under C-2 would be the thing we were going to use it for".

He went on to say that Council would have understood that he wanted all uses under the present C-2 open to him. His current plan to tear down one warehouse and replace it with another was not being considered at the time of the Council meeting.

In this case Council clearly did not have "sufficient knowledge of the applicant's proposal" and could not determine whether there were controls to reduce conflict. Without a specific proposal Council could not properly assess the criteria set out in Policy P-501.

Counsel for the Appellant suggests that it is sufficient that the Appellant has now testified as to his intentions. Section 63(5) of the **Planning Act**, however, places a restriction on the Board. The Board must find that Council's decision cannot reasonably be said to carry out the intention of the M.P.S. Council, in this case, considered the information before it and properly concluded among other reasons, that Policy P-501 was not satisfied. The Appellant is now proposing a specific plan which was not considered by Council.

The Board is satisfied Council could not "ensure a sense of security in Town" within the meaning of Policy P-211 if it rezoned the land. The present configuration of buildings on the Kingston Aluminum Property provides a clear boundary between residential and commercial uses in the area. The proposed plan of placing a building on Lot 88KA is perceived by the residents of West Prince Street as an intrusive extension of commercial uses in their community. This threatens their sense of security and Council obviously agreed.

The Board finds Council's decision to refuse the application to rezone reasonably carries out the intention of the M.P.S.

The Appellant raised as a ground of appeal that the company would suffer undue hardship because of Council's refusal to rezone Lot 88KA. No specific evidence was led about undue hardship nor was it addressed in the written brief.

Based on the evidence before it, the Board is satisfied that this is not a case in which the Board should apply Section 63(7). The Appellant approached the Town about buying Lot 88KA because of concerns about fires on the vacant land. The Appellant company was also concerned that someone else might buy the land. Council gave no assurance that the land would be rezoned at the time of the purchase. The Company could have applied to rezone it before purchasing it. Mr. Hutchinson, the President of the Appellant Company, is a former Councillor in Truro and as such is familiar with planning matters.

The Board dismisses the appeal. An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 26th day of June, A.D., 1989.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

L & G HOLDINGS LTD. v. CITY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-2P TO R-2AM TO PERMIT 14 UNIT APARTMENT BUILDING - FAIRVIEW SECONDARY PLANNING STRATEGY POLICIES 1.3.1; 4.2.

L & G Holdings Ltd. appealed Council's refusal to rezone 2 properties to permit it to build a 14-unit apartment building. As of right it could develop 4 to 8 apartments on the property.

HELD: Appeal allowed.

The proposal is within the intent of the M.P.S. Minutes do not clearly set out the saving policies under which Council acted. Uncontradicted expert evidence that Council's decision inconsistent with the intent of the M.P.S. Council made its decision for other than planning reasons supported by the M.P.S. Within the context of Policy 1.3.1, redevelopment includes infill.

NSMB-14-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **L & G HOLDINGS LIMITED**, a body corporate, from a decision of the Council of the **CITY OF HALIFAX** made April 13, 1989, refusing to rezone 3326-34 Dutch Village Road from R-2P (General Residential) to R-2AM (General Residential Conversion and Townhouse.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: K.H. ANTHONY ROBINSON, LL.B., on behalf of the Appellant, L & G Holdings Limited;

GERALD J. GONEAU, LL.B., and BARRY ALLEN, LL.B., on behalf of the City of Halifax.

HEARING DATE: July 13, 1989.

DECISION RENDERED: July 27, 1989.

DECISION: **Appeal allowed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, c. 9.

It is an appeal from the refusal decision of the City Council of Halifax to rezone certain lands from R-2P (General Residential) Zone to R-2AM (General Residential Conversion and Townhouse) Zone.

The Appellant **L & G HOLDINGS LIMITED**, a body corporate, is the Applicant for the rezoning. It is also the Appellant in this appeal. It applied to rezone civic numbers 3326-34 Dutch Village Road, Halifax, from their present R-2P (General Residential) Zone to R-2AM (General Residential Conversion and Townhouse) Zone. This rezoning would enable it to build a 14-unit, two-storey apartment house on the consolidated lot formed at the two addresses.

City Council turned down the request to rezone April 13, 1989.

The Appellant's Notice of Appeal was dated April 28, 1989. The Board received the FAXED Notice of Appeal on May 2, 1989 and the original Notice of Appeal May 3, 1989.

No one objected to the jurisdiction of the Board to hear this planning appeal. The Board determined on the evidence before it that it had jurisdiction to proceed with the appeal.

The Board had received written communication from certain citizens concerning this appeal while it was pending. In addition, the Chairman of the Board reported that he had received certain telephone calls showing a public interest in the appeal. In response to the apparent public interest, the Board in its usual advertisement provided for:

(1) its regular daily sitting to commence at 10:00 o'clock and, in addition,

(2) a special evening meeting on the same night at 7:30 p.m. The Board sat both times. No members of the public, other than the parties, came forward at either occasion.

On July 14, 1989, with the consent of both active parties the Board made an unaccompanied visitation to the site.

Under Section 16(1), the **Municipal Board Act**, S.N.S. 1981, Chapter 9, the Chairman assigned Board Member, Richard L. Weldon, to hear the appeal.

The Board heard this appeal at its 10:00 a.m. sittings on July 13, 1989. It sat at the Expropriations Compensation Board, 1660 Hollis Street, Suite 904, Halifax, Nova Scotia. The Board heard evidence tendered by the Appellant. The Respondent did not wish to tender additional evidence. Both the solicitor for the Appellant, Mr. Robinson, and the solicitor for the City, Mr. Goneau, made argument.

The Appeal Record, Exhibit L-9, at page 3, accurately describes the site as follows:

> "The site consists of two lots which when consolidated will have a total area of approximately 20,925 sq. ft. and a frontage of 92 ft. on Dutch Village Road. The site is occupied by a two-unit building and a single unit building as well as a number of garages and sheds."

This is an excerpt from staff report to Mayor and Council made December 12, 1988. Christopher Reddy, then a planner with the City, prepared the report. Mr. Reddy gave evidence before the Board. His report and evidence favourable to this rezoning form the planning underpinning for the Appellant's position in this appeal. The Board will be making frequent reference to this planning report in the following portions of the decision.

Before the Board proceeds further, it wishes to make some comment about the Appeal Record. It specifically notes the use in the Record of excerpts from the City Council Minutes. It also notes **Planning Rule** 17 (2)(e)(f).

Although the Appeal Record contains the full Minutes of the Public Hearing, it only contains an Extract from the Minutes of the Decisive Council Meeting. As a result, the Board does not know which Aldermen were in attendance and took part in the vote.

The Board further notes that the Minutes of the Public Hearing show that Aldermen entered during the course of the Public Hearing after the Planner had given his presentation. The Board does not know if these Aldermen were present and participated in the vote which denied the application for rezoning. Section 61C(2) of the **Planning Act** requires that only those present at the public hearing may vote on an amendment to the L.U.B.

Neither party to the appeal has raised any objection to the procedure followed.

Council held its decisive meeting on April 13, 1989. This following extract appears in the Minutes:

> "The City Clerk advised that Aldermen Leiper and Flynn had been absent from the 5 April public hearing on this matter."

The planners, after making the appropriate studies, recommended that Council grant the rezoning. They advised the proposal of the Appellant be looked on with favour. Planning Advisory Committee (PAC) was neutral in the matter. It referred the application to City Council for public hearing and subsequent disposal. City Council at its public hearing heard from all sides. At a subsequent meeting on April 13th, council turned down the application to rezone.

The Staff Report accurately summarizes a great deal of the Planner's evidence before the Board. Mr. Reddy proved his qualifications to the Board's satisfaction (on the consent of the parties and on filing his curriculum vitae) as an expert entitled to give opinion planning evidence on matters relating to Halifax.

As to the planning matters, the report has this to say at page 3 of the Appeal Record:

> "This site is located within the Fairview Secondary Planning Strategy. The Generalized Future Land Use Map places the site within the Medium Density Residential Designation."

Perusal of the Fairview Secondary Planning Strategy (F.S.P.S.) and its Generalized Future Land Use Map (G.FLUM) shows this allegation is factually correct.

Mr. Reddy then says:

> "Fairview Secondary Planning Strategy
>
>> In areas shown as "Medium Density Residential" on the Generalized Future Land Use Map (Map 9c) it is the City's intention to maintain the existing low-rise character of the area and to permit limited **redevelopment pursuant to Policies 1.3.1 and 1.6.** [emphasis that of the Board]".

Policy 1.6 deals with lots bigger than one acre and therefore has no application to this application. Policy 1.3.1 reads:

> "In medium-density residential areas, the City shall permit a maximum of four units per building, and may permit limited new development in excess of four units per building, in the following forms, through rezoning: [ii p. 150].
>
> a) n/a
>
> b) n/a
>
> c) small-scale multiple dwelling infill development; and
>
> when considering applications for rezoning, the City shall have regard for Implementation Policy Set 4, in particular Policy 4.2 in regard to the capacity of municipal services.

Policy 1.3.2 may also have some application. Policy 1.3.2 reads:

> "The Land use Bylaw shall include appropriate zones to implement Policy 1.3.1."

Policy Set 4 referred to in this Section appears at page II-201.

> "4. When considering amendments to the Zoning Bylaws and in addition to considering all relevant policies as set out in this Plan, the City shall have regard to the matters defined below.
>
> 4.1 The City shall ensure that the proposal would conform to this Plan and to all other City bylaws and regulations.
>
> 4.2 The City shall review the proposal to determine that it is not premature or inappropriate by reason of:
>
> i) the fiscal capacity of the City to absorb the costs relating to the development; and
>
> ii) the adequacy of all services provided by the City to serve the development."

The Report of Mr. Reddy goes on to say:

> "City services in the area are capable of accommodated the fourteen units proposed. In addition, the proposal is a small-scale multiple dwelling, infill development meeting the criteria of Policy 1.3.1, Section 8 of the Municipal Planning Strategy."

The Report carries an Appendix "A" which makes sure that these portions of the Policy were brought before Council.

In the final refusal of this application by Council on April 13, 1989, Council gave no written reasons except those the minutes showed. In the Minutes Alderman Jeffery referred to Policy 1.3 of the F.S.P.S. Whether or not Council decided on the quotations made from Alderman Jeffrey is uncertain. There is no other explanation on the record for the turndown. No other reasons appeared in these minutes. No one appeared to give other reasons to the Board.

The Board clearly sees that members of the public from the general area of the proposed redevelopment had petitioned City Council against the rezoning. They had appeared before the public hearing and had there spoken against the development. The Board is unable to determine to what extent, if any, these representations had any effect on the decision of the Council.

Mr. Robinson argued Mr. Reddy's opinion states the proposal of the developer was fully within the intent of the M.P.S./F.S.P.S. Mr. Reddy also advanced the opinion that the decision of Council could not be within the intent of the M.P.S./F.S.P.S. Mr. Reddy was the only expert to testify. Mr. Goneau, for the City, argued that the refusal decision of Council was reasonably within the intent of the M.P.S./F.S.P.S.

The Board can only consider the documented evidence and the testimony of the Appellant's witnesses. That is all that was adduced.

Mr. Rafeal, a principal of the Appellant, testified that he was an immigrant from Hungary who came here in the 1960's. He said he was an electrical engineer, a planner, a developer and an active businessman. He testified that his proposal was well-designed. He said he tended to develop buildings for his own subsequent management. Mr. Rafeal expressed very progressive views on the construction, management and tenanting of his buildings.

Mr. Rafeal demonstrated with the help of Exhibit L-13 the appellant's proposed garden apartment 14-unit construction. He proposed to demolish the buildings that were on this particular site. He would then use the site sensitively having regard to grades and the neighbours. He expressed the view that the units he proposed would be superior to what is on the property at present. Now several old barns, a warehouse, and a building formerly used as commercial office space, and a building used as a residential home occupy the site.

The Board viewed the site and saw nothing in its view that would cause it to disbelieve the testimony of Mr. Raphael. It accepts his testimony.

The Board finds for the purpose of this appeal that Mr. Rafeal is an intelligent developer. He wishes to make a sensible development of this land to the extent of 14 units. As-of-right (given the proper front footage on the two separate lots), the Appellant could develop four to eight individual apartments. The difference of density between what it can do as-of-right and what it proposes is either the difference between 4 and 14 units or 8 and 14 units depending on the frontage of the existing lots.

The lot (consolidated) contains roughly 1/2 acre.

Mr. Raphael has responded to certain requirements of the planning department in the alteration of his original plan. He impressed the Board as being an intelligent, sensitive developer. Beaufort Mader v. Municipality of the County of Halifax, NSMB-602-87-P (unreported) at page 11 says:

> "A rezoning application is based to a certain extent on trust."

In Bates and Schuhleimv. Town of New Glasgow, NSMB-4-89-P, (unreported) the Board's elaborated on this theme. It said on page 24 of that filed decision:

> "This is not an axiomatic given, but a semi-presumption if you will, subject to the introduction of evidence on the point of the developer's trustworthiness and skill."

Having heard the principal for the developer in this matter, the Board applied both those "elements of trust" tests to his testimony. He satisfied the Board on these points, at least for the purpose of this appeal.

Mr. Reddy traced through the M.P.S./F.S.P.S. texts laid out before the Board in this hearing. As a basis for his reasoning he said that "redevelopment" included "infill". He concluded this by reading the policies which allowed infill and the zone permitting this 14 unit which is the R-2 section in the L.B.-law, Exhibit L-11.

At page 143 under the Zoning Amendments there is a provision for the Zone R-2AM called General Residential Conversion and Townhouse Zone. At page 151 in the R-2 Zone 24(1)(f) says:

> "In the Fairview Secondary Planning Strategy area, as shown on Zm-16, conversions of existing buildings used for institutional purposes to a maximum of 4 units, provided that the height and floor area of the building are not increased."
>
> At page 157 - R-2AM Zone (General Residential Conversion and Townhouse Zone - Permissible Uses.
>
> ...
>
> 28(BA)(1) The following uses shall be permitted in a R-2AM Zone.
>
> c) apartment house to a maximum of 14 units.
>
> Page 159 28(BF-1):
>
> Notwithstanding the provisions of this By-law the City may permit an **infill development** that would not be permitted under the provisions of this by-law provided the following special conditions are satisfied:
>
> Special Condition: a) If the **existing building** is a full storey lower than the average number of storeys of the existing residential buildings in the neighbourhood.
>
> Development Permitted: The number of storeys may be increased to but not exceed the average number of storeys.
>
> 28(BF-2):
>
> The immediate neighbourhood shall consist of:
>
> i) if the building is located at mid-block all existing residential buildings located on four lots on

> each side, the lots on the rear which share the same lot line and the corresponding lots on the opposite side of the street.

The Board lays this paper trail, to some extent, in its effort to follow Mr. Reddy's reasoning why he so defined this project "infill".

During the hearing the Board felt that the M.P.S./F.S.P.S. permitted "infill" development only, to the 14 unit maximum. The Board felt (during the hearing) that the proposal, namely the destruction of the existing buildings and uses and replacement with apartment residential use, was "re-development", that it was not "infill". That "redevelopment" to 14 units was contrary to the intent of the M.P.S./F.S.P.S. That was how the Board then understood those two terms. The Board, in its own feeling, viewed "infill" as the development of vacant land located amidst developed land with uses which necessitated construction and the loss of vacancy.

Mr. Reddy's opinion was to the contrary. He said, although the M.P.S./F.S.P.S./L.U.B. did not specifically define "infill", the L.U.B. clearly left as the only possible inference that "infill" (as used in the F.S.P.S.) would include "re-development". Failing that "re-development" would include "infill". Section 28(BF)(1)(a) in the L.U.B. clearly shows that existing buildings fit under the meaning of "infill" development. The Board therefore accepts Mr. Reddy's definition in these particular circumstances under this M.P.S./F.S.P.S./L.U.B. Mr. Reddy has made the correct inference. He has currently defined "infill" so that it includes the present project. The Board, however reluctantly, agrees that Mr. Reddy is correct in his interpretation.

The Board, therefore, cannot reject this proposed development merely because it is not "infill" but "re-development". In this portion of the F.S.P.S. "re-development" as the Board understands it, includes "infill" and vice versa.

The Board had come to its erroneous understanding from hearing excerpts read at the hearing of the various pieces of municipal legislation. The Board clearly notes neither counsel advocated anything different from Mr. Reddy's interpretation.

Mr. Goneau was very careful to point out that Council had a discretion. He emphasized the word "limited" development. He argued that Council had no duty to rezone pursuant to any application within the M.D.R. (medium density residential area on the G.FLUM) designation.

The Board has a duty on resolving an appeal of a rezoning refusal decision, under Section 63(3) of the **Planning Act**. It must determine whether the decision of the Council reasonably carries out the intent of the M.P.S.

Under Section 63(5) of the **Planning Act** the Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the M.P.S.

> Under Section 63(7) of the **Planning Act** the Board may, notwithstanding subsection (5), allow the appeal by an applicant if, in the opinion of the

> Board: a) the applicant would suffer undue hardship or b) extraordinary and compelling circumstances are present.

In this particular case, the Board has no hesitation (it was not argued by anybody) in finding, that the applicant would suffer no undue hardship or that there were any extraordinary or compelling circumstances. Therefore Section 63(7) applied to the facts of this appeal give no basis for the appeal to succeed.

For the Appellant to succeed in this matter on a refusal decision, it must satisfy the Board of two things:

1. that its application reasonably fits within the intent of the M.P.S./F.S.P.S.

2. that the decision of Council does not.

If it fails in either one of these two situations, its appeal fails.

In the absence of evidence to the contrary and in line with the paper trail noted elsewhere in this decision, the Board is of the opinion that the proposal of the Appellant does fit within the intent of the M.P.S./F.S.P.S.

The Board is of the opinion that if a proposal does not fit within the intent of the M.P.S. it is unable, subject to the possible exception of an Order under Section 63(7), to order Council to rezone.

In the event the Board found on the evidence that the proposal does fit reasonably within the intent of the M.P.S.

The question, then, the Board must resolve is whether or not the refusal decision of Council refusing also fits within the intent of the M.P.S./F.S.P.S.

Council had before it planning evidence (which the Board has accepted) that the proposal fits within the M.P.S./F.S.P.S. Council had no planning opinion to the contrary before it. Mr. Goneau argued that there were planning considerations on which Council could have relied which would allow it to exercise its discretion in the way that it did.

The extracts of Minutes of Council do not clearly set out the saving policies under which Council proceeded. There are no additional reports or direct recitation of facts known to the Board.

The opposition of some people in the neighbourhood was before Council. The expressed reasons minuted were not, in the view of the Board, founded in the intent of the M.P.S./F.S.P.S.

Council was free to present planning evidence to the board to show that its decision reasonably fit within the intent of the M.P.S. It chose to rely on the planning evidence adduced, consisting of the uncontradicted evidence of Mr. Reddy that the decision of Council did not fall within the intent of the M.P.S.

In view of this uncontradicted opinion upon which the Board (in this case) relies, the Board finds that the Council made its decision for other than planning reasons which may be supported by the M.P.S./F.S.P.S' intent. Therefore its decision cannot be within the intent of the M.P.S./F.S.P.S.

Therefore the Board will allow the appeal under

Sections 64(4)(c) of the **Planning Act**, it will instruct the Council to amend the By-law in the manner prescribed by the Board.

The Board refers to the report of Mr. Reddy made to Council recommending rezoning from R-2P (General Residential) Zone to R-2AM (General Residential Conversion and Townhouse) Zone. The report stipulated the Applicant demolish the existing structures and consolidate the lots.

The Board is uncertain from the evidence before it whether the consolidation has already been accomplished. The Board will tailor the rezoning as far as possible to enforce the staff report's stipulation in the Order which will follow.

DATED at HALIFAX, Nova Scotia, this 27 day of July, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

GOSHEN v. CITY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-2P TO R-2AM TO PERMIT 14-UNIT APARTMENT BUILDING - FAIRVIEW SECONDARY PLANNING STRATEGY POLICIES 1.3, 1.3.1, 4.2.

J.G. applied to rezone 2 lots in Fairview to permit demolition of existing houses and construction of a 14-unit apartment building. A similar rezoning had recently been permitted on the adjacent property. Abutting the lots on the rear are single family homes and residents are opposed to the rezoning.

HELD: Appeal allowed.

The M.P.S. and F.S.P.S. permit rezonings to R-2AM if there are adequate services and no costs to the City. Council does have a discretion but it must be exercised with proper planning considerations. The Board understands and sympathizes with the concerns of residents that infill development may have an adverse impact on a neighbourhood. There is nothing to distinguish this rezoning from adjacent one. Council may have been misled but Board has no authority to refer matter back to Council.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **JOSEPH GOSHEN** from a decision of **HALIFAX CITY** Council, made the 13th day of April, 1989, refusing to rezone 3-5 Alma Crescent from R-2P (General Residential) Zone to R-2AM (General Residential Conversion and Townhouse) Zone to permit construction of a 14 unit apartment building.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: Daniel Clarke, L.L.B., for the Appellant
Gerald Goneau, L.L.B., for the City of Halifax

HEARING DATE: July 20, 1989

DECISION DATE: July 27, 1989

DECISION: Appeal Allowed

DECISION

Joseph Goshen owns two adjacent lots, Civic No. 3 and 5 Alma Crescent in Fairview. There is a vacant single family home on each lot. One of the homes is in a dilapitated condition. He applied to rezone the two lots from R-2P (General Residential)

Zone to R-2AM (General Residential Conversion and Townhouse) Zone to permit construction of a 14 unit apartment building.

The Fairview area contains a mixture of residential and minor commercial uses. While a large part of Fairview consists of single family homes, over the years apartment buildings have been built in the area. A minor commercial area exists along Dutch Village Road.

Alma Crescent is a short street which runs between Titus Street and the intersection of Dutch Village Road and McFatridge Road. The properties on the north side of Alma Crescent back onto properties on the south side of Main Avenue. There is a small shopping plaza at the Titus Street end of Alma Crescent. A 68 unit apartment building is located on the opposite side of Alma Crescent. There is also an 18 unit apartment building on the street. Immediately to the east of the subject property, a 14 unit apartment building is under construction. Aside from the subject property only one single family home remains on the street. There are single family homes along the south side of Main Avenue which abut the subject property. There are also single family homes on McFatridge Road.

In January, 1985 City Council adopted the Fairview Secondary Planning Strategy ("F.S.P.S."). The overall objective of the F.S.P.S. is:

> "Maintain and enhance the residential environment of Fairview while allowing for growth and change in designated areas."

The Generalized Future Land Use Map for Fairview shows a mixture of uses including Low Density Residential, Medium Density

Residential and Minor Commercial. The subject property is in a Medium Density Residential area. There are two relevant policies in the F.S.P.S. dealing with medium-density residential areas. They are as follows:

> 1.3 In areas shown as "Medium-Density Residential" on the Generalized Future Land Use Map (Map 9c) it is the City's intention to maintain the existing low-rise character of the area and to permit limited redevelopment pursuant to Policies 1.3.1 and 1.6
>
> 1.3.1 In medium-density residential areas, the City shall permit a maximum of four units per buildings, and may permit limited new development in excess of four units per building, in the following forms, through rezoning:
> (a) conversions of and additions to existing buildings;
> (b) townhousing;
> (c) small-scale multiple dwelling infill development; and
>
> When considering applications for rezoning, the City shall have regard for Implementation Policy Set 4, in particular Policy 4.2 in regard to the capacity of municipal services.

The Land Use By-Law ("L.U.B.") established two zones for medium density:

1) R-2P (General Residential) Zone which permits buildings containing not more than 4 units; and

2) R-2AM (General Residential Conversion and Townhouse) Zone which permits apartment buildings up to 14 units.

The subject property is zoned R-2P. The individiual lots are not large enough to permit an as-of-right development of 4 units on each. They may be eligible for 2 units.

As noted above a 14 unit apartment building is being constructed on the adjacent lot. Recently this lot went through a successful rezoning. W.M. Faris & Associates did the design work for that building and drew similar plans for the subject property.

At the Board hearing the Appellant's witnesses included Gary Porter, a planner with the City, who prepared the Staff Report recommending Council approve the rezoning.

The Board held an evening hearing and two residents of the area, Ronald Bates and Ian McGillvray spoke in opposition to the rezoning. The Board also received letters from two individuals who were opposed to the rezoning but were unable to attend the hearing.

The Appeal Record contained a memo from the Planning Advisory Committee ("PAC") to Council. This memo indicates that the PAC's position is "developmental potential in the problem areas in Fairview should be reduced". PAC asked staff on January 17, 1989

> "to review and advise on admendments to the R-2AM (Conversions and Infill) Zone to increase the lot size and reduce the number of units."

The Board was not advised whether further action had been taken. An earlier staff report (July 12, 1989) indicated that the area where the subject property is located is suitable for R-2AM development.

At the Public Hearing, a number of residents opposed the development citing increased traffic, the creation of an undesirable neighbourhood, excessive garbage, increased noise, lack of snow removal. It was also stated that apartment buildings are crowding out the single family homes by being built around them.

Both Mr. Bates and Mr. McGillvray said that apartment buildings change the nature of the neighbourhood and have an adverse impact on the value of their homes. Mr. Bates also stated that few children live in apartment buildings and this will impact on the neighbourhood school. Mr. McGillvray stated that apartment rates of occupancy are low and that a new building will only draw tenants who already live in older buildings.

Mr. Goshen filed a petition which he had circulated following Council's decision. The petition lists 16 names of persons residing in the area who support Mr. Goshen's appeal.

Alderman Jeffrey made the motion to deny the application for rezoning. The Minutes indicate that he made the following comments before the vote was taken:

> "Alderman Jeffrey noted that, should the request for rezoning be approved, the applicant proposes to consolidate the lots at 3-5 Alma Crescent and to construct a 14-unit apartment building. The Alderman emphasized that Policy 1.3 of the Fairview Secondary Planning Strategy provides for the preservation of the exisiting low-rise character of the neighborhood in question while allowing "limited" infill, and suggested that "limited" in this context implies only those uses permitted by the R-2P Zone (i.e. 1-4 units). Alderman Jeffrey drew Council's attention to the fact that the quality of life in this area has already been threatened by the intrusion of several high-density uses, and

> emphasized that residents are extremely unhappy with infill proposals of this magnitude, feeling that they will result in the complete deterioration of the R-1 and R-2 zones. He also advised that traffic is already of some concern, owing to the narrowness of the streets in the area and the heavy concentration of school children who use these routes to access both the Titus Street Elementary School and Halifax West High School."

6

At the Board hearing both counsel based their arguments on Policies 1.3 and 1.3.1 cited above. There was no discussion of the overall policies in the Municipal Planning Strategy (M.P.S.) dealing with Residential Environments. Implementation Policy 4.2 was referred to and it provides as follows:

> 4.2 The City shall review the proposal to determine that it is not premature or inappropriate by reason of:
>
> i) the fiscal capacity of the City to absorb the costs relating to the development; and
>
> ii) the adequacy of all services provided by the City to serve the development.

The position of the Appellant is that there is little difference between his application for rezoning and the adjacent one which was approved. While acknowledging that Council does have a discretion, Mr. Clarke argues that the decision must not be capricious or arbitrary.

Mr. Goneau, on behalf of the City, agrees that if Council had approved the rezoning, the decision would be consistent with the planning strategy. He argues that the decision to refuse is equally consistent. He stresses that Council's decision is discretionary and that Policy 1.3.1 places a limit on the number of rezonings. Mr. Goneau also argued that the Board was not to base its decision on the reasons cited by Council.

The Board has difficulty in accepting the interpretation which is being placed on the word "limited" as it appears in Policies 1.3 and 1.3.1. Both Mr. Porter as a City Planner, and Mr. Goneau suggest that it is intended to limit the number of rezonings permitted. If that is the intention, it is an odd grammatical structure which has been chosen.

The Board reads "limited" in these two policies as meaning that the L.U.B. will put a cap on the number of units to be permitted in a "redevelopment" or "new development". This has been done, the maximum number of units is 14 - that is the limit.

If, however, Mr. Goneau and Mr. Porter are correct, what then determines when the limit has been reached? Mr. Porter says it was not reached and the rezoning should be permitted. Mr. Goneau says it has been reached. The evidence is that there have been 4 rezonings permitted since the F.S.P.S. came into effect in 1985. Given the rest of the wording in Policy 1.3.1, the Board cannot accept that it was intended that only 4 rezonings would be permitted for all of the land in Fairview designated Medium Density Residential.

The comments of Alderman Jeffrey cited above show that he placed an interpretation similar to the Board's on the word "limited." In doing so, he erred in the Board's opinion in suggesting that "limited" referred to 1-4 units rather than 14 units.

Alderman Jeffrey also made reference to the deterioration of the R-1 and R-2 zones. This is misleading since the applicable zone is R-2P which is a greater density than either R-1 or R-2.

The M.P.S. and F.S.P.S. as drafted, permit rezonings to R-2AM if there are adequate City services and no costs to the City (Implementation Policy 4.2). Some other policies in the M.P.S. require that the "amenity, convenience, character and value of the neighbourhood properties will not be affected" before a rezoning is permitted. Unfortunately for those opposed to this development, these other policies do not apply in this case.

If the criteria in Implementation Policy 4.2 is met, does that mean that the rezoning must be granted? The answer to that question is no. Council does have a discretion but the discretion must be exercised with proper planning considerations.

In this case, the comments of Alderman Jeffrey prior to the motion passing do not conform with the existing policies. His comments may well have misled Council.

The City did not call any evidence. There have been no policies cited which would support Council's decision, nor evidence led that Council's decision was consistent with the intent of the M.P.S.

The Board was not provided with any background information on the F.S.P.S. which might assist in the interpretation of Policy 1.3 and 1.3.1. There is nothing to distinguish this rezoning with the adjacent one which was recently approved by Council.

The Board understands and sympathizes with the concerns of local residents that infill developments of 14 units may have an adverse impact on a neighbourhood. P.A.C. has expressed concern about this impact but it appears that no action has been taken to change the L.U.B. and reduce the maximum number of units permitted.

Section 63(4) of the Planning Act does not permit the Board to refer a matter back to Council even where the information on which Council acted may have been in error. The Board must either confirm Council's decision or allow the appeal.

Based on the evidence before it, the Board is satisfied that Council's decision is not reasonably consistent with the intent of the municipal planning strategy. The Board allows the appeal and instructs Council to amend the L.U.B. by rezoning 3-5 Alma Crescent to R-2AM (General Residential Conversion and Townhouse) Zone.

An Order will issue accordingly.

DATED AT HALIFAX, Nova Scotia this 27th day of July 1989.

Linda D. Garber

Linda D. Garber
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD

REDDEN BROS v. **TOWN OF BEDFORD AND OAKMOUNT RESIDENTS ASSOCIATION**

PLANNING - DEVELOPMENT AGREEMENT - REFUSAL TO ENTER INTO A PERMIT FOR TWO 28-FAMILY UNITS - BUFFERING.

R.B. Ltd. applied for a development agreement to build 16 homes with basement apartments and 24 link homes in R-1 Zone in Bedford. Adjacent home owners association joined as Interested Person. As required, Council gave reasons for its refusal. Existing traffic problem in area. An earlier application to rezone land to R-2 was withdrawn by Appellant after public hearing.

HELD: Appeal allowed.

Traffic flow caused by proposed development was not a major consideration of Council. There is some danger in relying extensively on a report which was prepared for a previous application. The reasons listed by Council are not supported by evidence or M.P.S. Board had evidence not available to Council. There is nothing in M.P.S. which permits discrimination based on rental units v. owner-occupied units. There is sufficient separation between the two subdivisions.

Stability in a fully developed community is desirable. When part of community is undeveloped, changing circumstances require consideration of planning changes. The purpose of Planning Act is to attempt to balance conflicts that may arise. The Board encourages Council's attempt to effect a compromise.

NSMB-9-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, Chapter 9, by **REDDEN BROTHERS DEVELOPMENT LIMITED** from a decision of **BEDFORD** Town Council made March 13, 1989, which decision rejected the Appellant's application to enter into a development agreement to construct two family dwellings on 28 lots (homes with basement apartments on lots 30-50 and link homes on lots 1, 9-14 and 30-34) in the Oakridge Subdivision, Bedford, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, Chairman.
LINDA D. GARBER, Vice-Chairman.

COUNSEL: PETER J.E. McDONOUGH, Q.C., on behalf of the Appellants, Redden Brothers Development Limited;

PETER McINROY, LL.B., on behalf of the Respondent, Town of Bedford;

KENNETH A. MacINNIS, Q.C., on behalf of the Interested Party, Oakmount Residents Association.

HEARING DATES: June 7, 1989,
June 8, 1989,
June 12, 1989.

BRIEFS SUBMITTED: For the Appellant - June 20, 1989;
For the Respondent - June 27, 1989;
For the Interested Party - June 27, 1989.

Appellant's Rebuttal - July 4, 1989.

DECISION DATE: July 28, 1989.

DECISION: **Appeal Allowed.**

DECISION

The lands subject to this appeal are located in an area known as Oakridge Subdivision (Oakridge) in the Town of Bedford. This subdivision is situated on the north side of Rocky Lake Drive, a short distance from its intersection with Highway 1 (the Bedford Highway). It is accessible only by Duffus Drive which enters from Rocky Lake Drive. Approximately half way into the subdivision Duffus Drive turns slightly right and then circles around to the left rejoining itself at the half-way point forming a circular drive. The subdivision consists of approximately 50 lots, 26 of which are zoned R-1 with the remainder zoned R-2.

Immediately adjacent to Oakridge, to the northwest, is Oakmount Subdivision (Oakmount). This subdivision is zoned R-1 and is fully developed as single family dwellings. It is accessible from Rocky Lake Road by Rockmanor Drive which is next to Duffus Drive. It is also directly accessible from Highway number 1 by Oakmount Drive.

Near the end of November, 1988, Redden Brothers Development Limited made application for a development agreement which proposed the construction of 56 new dwelling units on the 28 lots in Oakridge.

The development agreement proposed that 16 of the R-1 lots in Oakridge would be developed as homes with basement apartments. These 16 lots directly abut the single family homes on the southeast side of Rockmanor Drive in Oakmount. There is a rocky ridge separating these lots of land. This ridge places Oakridge approximately 30 feet above Oakmount.

The proposal further provided that link homes would be built on the remaining 12 lots. Seven of these lots are located directly across the street from the proposed homes with basement apartments on the north side of the circle formed by Duffus Drive. The remaining five lots are located at the end of the homes with basement apartments and curve around the outside of the Duffus Drive circle. Two of the five lots are zoned R-2 and could have link homes constructed on them as-of-right but are included with the application as they form part of the total development. The line between the R-1 and R-2 zones runs through the centre part of the Duffus Drive circle and continues on down the center of Duffus Drive towards Rocky Lake Drive splitting Oakridge in half.

In late December, 1988, the Town Planning Staff prepared a report recommending the entering into of the development agreement with some provision relating to pending budget approval items for improvements on the Rocky Lake Drive/Bedford Highway intersection and the possible addition of some landscaping requirements.

On February 12, 1989, after hearing opposing comments from a number of interested parties, the Bedford Planning Advisory Committee passed a motion that Council consider entering into a development agreement in a close vote (5 to 4).

At its meeting on March 13, 1989, Council passed a motion which in effect required that lots 34 to 50 would remain R-1. These were the lots on which 16 single family homes with basement apartments were to be constructed plus one lot on which a link home was to be constructed. Council's motion was worded in such a way as to appear to approve the entering of the development agreement but contained a provision which required the Appellant to agree. The motion substantially affected 17 of the 28 lots.

The Appellant obviously did not agree to the provision. The Board received notice from Redden Brothers Development Limited on March 30, 1989 that they wished to appeal Council's decision which did not fully approve the Appellant's proposal.

The Board has determined that the motion of Council was a refusal to enter into a contract development agreement and as such is appealable under Section 72(1) of the **Planning Act**. This Section states:

> "Where a Council has refused to enter into an agreement after application has been made to it pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board."

Sections 55 and 56 of the **Planning Act** refer to development by agreement.

Section 72(4) of the **Planning Act** sets out the Board's power when dealing with a refusal of a development agreement. This Section states:

> "The Board shall not interfere with the decision of the council pursuant to this Section unless the Board

> determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall
>
> a) refer the matter back to the council;
>
> b) instruct the Council to hold a public hearing, if this had not been carried out prior to the appeal being made by the Applicant."

In this case a public hearing was held prior to the appeal and subsection (b) will not apply.

Kenneth A. MacInnis applied on behalf of the Oakmount Homeowners Association (Association) to participate in the hearing. The Association is incorporated under the Societies Act of the Province of Nova Scotia. The Board found that the Association had a real and substantial interest in the subject matter and permitted it to participate as an Interested Party.

On behalf of the Appellant, Peter McDonough called Alfred Wallace, a land surveyor, Steven Moir, Senior Planner for the Town of Bedford and Barry Zwicker, Director of Planning and Development Control for the Town of Bedford.

Peter McInroy, on behalf of the Town, called Rick Paynter, Director of Engineering and Public Works for the Town of Bedford.

On behalf of the Interested Party, Mr. MacInnis called Ralph Morehouse, David Bethune, Kevin Blake, Lorne Verabioff, Brian Gillis and John Merrick.

At the Board's evening session held June 7, 1989, 12 people from the general public testified.

In addition, Aileen MacCormack, Councillor Don Huntington, Councillor Peggy Draper and David Bethune testified concerning their understanding of a comment made by Barry Zwicker at the conclusion of the Council meeting on March 13, 1989.

In March 1988 the Appellant applied to rezone the same lots from R1 to R2 to permit link homes on all of the lots. Following the public hearing, where residents of Oakmount objected to the height of the link homes on the lots which abutted their subdivision, Redden Brothers withdrew the application. The current proposal was developed as an attempt to satisfy those objections. During the course of the Board's hearing reference was made to some of the staff reports which had been prepared as a result of the previous rezoning application.

Mr. Wallace reviewed a number of surveys of the subject property. The first (Exhibit R-6) showed the various parcels of land and their acquisitions dates which made up the subject property. The next was a plan dated November 7, 1988, (Exhibit R-7) which showed the lot details and layout of the subdivision as proposed by the development agreement.

He next reviewed three plans, Exhibits R-8, R-9 and R-10 (dated April 28, 1975, March 12, 1976 and January 3, 1979). These three plans show a portion of Oakmount Park Subdivision as it was envisioned at those dates. Although the configuration is different than the current proposed plans, the section of land which is objected to by the Association and ultimately rejected by Town Council is clearly shown. These plans show a street which would access onto Rockmanor Drive. They clearly show that, on at least nine lots, it was proposed by Redden Brothers, to construct R-2 type two family dwellings.

Mr. Wallace also reviewed photographs, (Exhibits R-11, R-12 and R-13) which show eight different scenes of the subject area. They show the treed area between the subdivisions and single family houses under construction on Duffus Drive. The Board specifically notes these Exhibits because with the exception of R-7 they were not available to Council during its deliberations.

[illegible]hibit R-7 in addition to showing the layout of Oakridge contained sketches of a typical bungalow and a split entry two-unit dwelling being proposed for lots 35 to 50.

Steve Moir the Senior Planner for the Town of Bedford was qualified by the Board to give opinion evidence on planning matters. Mr. Moir appeared under subpoena.

Mr. Moir prepared the Staff Report. He recommended that approval be given to the development agreement with a qualification that Council might wish to delay the agreement until a budget item on improvements to the Rocky Lake Drive traffic problem was addressed and that there might need to be some landscaping requirements added. The Staff Report is included in the Appeal Record. Landscaping requirements were included in the draft agreement presented to Council.

Mr. Moir also referred to various other matters included in the Appeal Record such as the Minutes of the Bedford

Planning Advisory Committee ("B.P.A.C."), sections of a memo from the Chairman of B.P.A.C., and matters relating to traffic from a memo of Rick Paynter regarding services for the subdivision-(This memo had been prepared in conjunction with the rezoning application in the spring of 1988). He also reviewed portions of a memo from Rick Paynter to the Mayor regarding the traffic improvements on Rocky Lake Drive dated March 8, 1989. He referred to approvals of the proposal by the Fire Department and the School Board.

Barry Zwicker, also appearing under subpoena, was qualified by the Board as a an expert to give opinion evidence on planning matters. Mr. Zwicker is the Director of Planning and Development Control for the Town of Bedford and has been since the time of the development of the first Municipal Development Plan and the Land Use By-laws.

Mr. Zwicker stated that he agreed with the staff recommendation to Council concerning the entering into of the development agreement. He reviewed and discussed various other sections of the Appeal Record (Exhibit R-2) and relevant parts of the Municipal Planning Strategy (M.P.S.) and Land Use By-laws.

Mr. Zwicker discussed a Staff Report from John Malcolm dated May 13, 1988, to the Bedford Planning Advisory Committee. Mr. Malcolm was the Senior Planner for the Town of Bedford prior to Mr. Moir. This Staff Report reviewed the earlier application of Redden Brothers Limited to rezone the subject property from R-1 to R-2. Mr. Malcolm's report concluded with the recommendation that rezoning be refused for lots 34 to 50 - these being the lots which directly abut Oakmount and further recommended that rezoning be approved for the remaining lots. Mr. Malcolm made reference to two new draft policies for the M.P.S.

Under questioning from the Board, Mr. Zwicker identified certain pieces of evidence which the Council did not have at the time of their consideration of their decision. These included the photographs on Exhibits R-11, R-12 and R-13, a newsletter prepared on Oakmount Homeowners Association letterhead reporting on the results of the Council Meeting, the survey map showing the history of the acquisition of the land parcels and the survey plans shown on Exhibits R-8, R-9 and R-10. Mr. Zwicker also indicated that although the Minutes did not show it, the matter of the traffic problem of Rocky Lake Drive and the Bedford Highway (Highway No. 1) as it related to this development agreement, was fully discussed during the course of the Council meeting.

Rick Paynter, the Director of Engineering and works for the Town of Bedford, was qualified by the Board to give expert opinion in engineering matters as they relate to this appeal.

Mr. Paynter's testimony centered around the traffic situation at the intersection of Rocky Lake Drive and the Bedford Highway. Mr. Paynter stated that a survey in 1986/86 indicated that there were approximately 7,500 to 8,000 vehicle trips per day. He believes that the current figures would be in the vicinity of 12,500 to 13,000 vehicle trips per day. Of this, approximately 500 to 600 trips per day would represent trucks, mainly caused by the Bedford Waterfront Development Project.

On the basis of eight vehicle trips per day per unit, Mr. Paynter calculated that Oakridge, if developed as of right, would generate approximately 600 additional vehicle trips per day. If the development agreement was granted there would be an increase of approximately 220 vehicle trips per day.

Mr. Paynter reviewed the current position of the Town relating to the improvements to be made to the traffic situation at Rocky Lake Drive which would centre around an expansion of traffic signal control system. Council has not made a final decision in the matter although some funds were allocated in 1989 to be used for consulting purposes. The program has not yet received final approval from the Province of Nova Scotia. A final proposal should be ready for the fall of 1989 to be considered for the 1990 budget.

Traffic on Rocky Lake Drive is affected by many factors, many of which are outside the control of the Town of Bedford such as various developments within the County of Halifax in that general area and continued growth of Burnside Industrial Park in the City of Dartmouth.

Throughout his testimony, Mr. Paynter continued to stress that the Town must concern itself with all traffic growth in the area because of the problem on Rocky Lake Drive. Any increase in growth of traffic on Rocky Lake Drive is a problem because of the already existing situation.

The six witnesses who testified on behalf of the Interested Party covered a history of the formation of the Association and its involvement in community activities. The testimony concentrated on the objections to the proposed development agreement. These objections included the increased density caused by the proposal, the increase in traffic, not only on Rocky Lake Drive but through the subdivision, arguments related to rental units v. owner occupied units, arguments related to the residential mix included in the neighbourhood and matters relating to appropriate buffering between the two subdivisions.

Common throughout all of their testimony was the theme that no change should occur on the subject property which abuts Oakmount. They all believed that the property was zoned as R-1, (Single Family Dwelling) and would be developed as owner occupied, when they purchased their homes in the mid to late 1970's. They felt that no change should occur once a subdivision is in place.

Ralph Morehouse who testified on behalf of the Homeowners Association, was the first President of the Association.

David Bethune is the current President.

Ivan Blake is an interested member of the Association who drafted the letter signed by David Bethune to the Mayor and Council which was included in the Appeal Record - Exhibit R-2, at page 72. He also prepared, wrote and distributed the Homeowners

Association letter reporting on the Council meeting of March 13, 1989, also included in the Appeal Record, at page 87.

Dr. Lorne Verabioff is a member of the Halifax County Bedford District School Board.

Brian Gillis and John Merrick, both attended a meeting in December, 1980, at which two members of Bedford Town Council met with five to seven residents of Oakmount Subdivision to discuss matters of mutual concern relating to the development of the area. Notes of this meeting were provided (Exhibit R-25).

Of the twelve residents who testified at the evening session of the hearing, two spoke in favour of the proposed development. Of the remaining ten who spoke against it, two were residents of Oakmount and eight were residents or proposed residents of Duffus Drive in Oakridge. Most had similar concerns to those related by the witnesses for the Association. The Duffus Drive witnesses centered more on the rental versus owner/occupied issue. They were under the impression that future development on Duffus Drive would be in the form of owner/occupied units as opposed to bungalows with basement apartments for rent.

The Board took a view of the subject property. There is one single family home completed and two under construction on the lots in question. At least one of the two under construction appears to have been designed to permit a basement apartment if the appeal is successful.

In accordance with section 72(2) of the Planning Act, Council gave reasons for refusing to enter into the proposed development agreement. The Minutes of the March 13, 1989 Council meeting state the following:

> "During the ensuing discussion Councillor Draper advised of her reasons for her Motion that the Agreement be rejected unless the requested change is made as follows:
>
> 1. The points covered by the Planning Department in its report attached as 6.1 to the Council materials;
>
> 2. The report respecting the laterals from Mr. Paynter, Director of Engineering and Works;
>
> 3. Disagreement with the provision taken by Mr. Morrison on behalf of the School Board as Councillor Draper felt, as an educator, that 19 or 20 pupils per teacher was an ideal situation;
>
> 4. The proposed density of 8.7 units per acre she felt was unacceptable."

The Board has reviewed the M.P.S. for the Town of Bedford and considers the following sections to be relevant to the issues and arguments of this case.

> RESIDENTIAL SECTION
>
> OBJECTIVE
>
> The following overall objective for the residential section was used as a general guideline. It is the objective of the Town Council:
>
> to make provision for high quality, mixed housing types to meet the needs of a range of income groups. Such development will be allowed to occur in areas that are economically viable and in an environment that will enhance the character of the Town and be an asset at the neighbourhood scale.
>
> LOCATION
>
> ...Eight units per net acre as an average is considered

a low density for an urban - semi-urban area....

HOUSING TYPES

Policy R-4a: It shall be the intention of Town Council to make provision in the Zoning By-law for a range of residential uses, including: single detached, two family, townhousing, apartment buildings and mobile homes.

TRANSPORTATION SECTION

OBJECTIVE

In producing this section of the MDP, the following objective was used as a general guideline:

It is the objective of Town Council to provide for an economical, safe and attractive transportation network, with emphasis on public transportation, pedestrian and convenience, and through movement of goods which minimizes detrimental impacts on residential and business neighbourhoods, and which maximizes accessibility from home to work and to business and community facilities.

ROAD NETWORK

Policy T-3: It shall be the intention of Town Council in cooperation with the Department of Transportation to undertake improvements to provide for the safe and efficient movement of vehicles through the major arterial highway intersections....

iv) Rocky Lake Drive - Rocky Lake drive from the Town Limits to its intersection with the Bedford Highway provides a major link for the industrial traffic generated from the Bedford Industrial park and the Municipal Sprayings Crusher and Asphalt Plant just outside the Town's boundary.

Much of this traffic could be eliminated with the construction of Burnside Drive through to the Bicentennial Highway if direct access is provided for in the Industrial Park area. With this construction, only minor improvements to Rocky Lake Drive may be necessary.

IMPLEMENTATION SECTION

CONTRACT ZONING

Policy Z-4: It shall be the policy of Town Council in considering zoning amendments and contract zoning, in addition to all other criteria as set out in various policies of this plan, to have regard to the following matters:

1) That the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;

2) That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal;

3) Provisions are made for buffering, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;

4) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Town to absorb any costs relating to the development;

ii) the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private onsite sewer and water systems;

iii) precipitating or contributing to a pollution problem in the area;

iv) the adequacy of storm drainage and the effect of drainage areas on adjacent uses;

v) the adequacy and proximity of school, recreation, and any other community facilities;

vi) the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

vii) the potential for the contamination of water courses or the creation of erosion or sedimentation;

viii)impact on public access to the shorelines or the waterfront;

ix) the presence of natural, historical features, buildings or sites;

x) creating a scattered development pattern requiring extensions to trunk facilities and public services while other such facilities remain underutilized.

5) Where this plan provides for special agreements or contracts to ensure compatability or reduce potential conflicts, such agreements may relate to, but are not limited to, the following:

i) type of use, density, and phasing;

ii) emissions including air, water, and noise;

iii) traffic generation access to and egress from the site, and parking;

iv) open storage and landscaping;

v) provisions for pedestrian movement and safety;

vi) provision and development of open space, parks, and walkways;

vii) drainage both natural and subsurface and soil stability;

viii)performance bonds;

ix) the compatibility of the structure in terms of design and appearance with adjacent residential uses.

6) Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.

7) In addition to the foregoing, all zoning amendments and contract zoning agreements shall be prepared in sufficient details to provide:

i) Council with a clear indication of the nature of the proposed development; and,

ii) Permit staff to assess and determine the impact such development would have on the proposed site and the surrounding community.

MUNICIPAL FINANCES

> In addition to guiding and providing for orderly private development within the Town, the MDP provides opportunity for public involvement and expenditures in the undertaking of programs to achieve the policies of this Plan. It is primarily the direction of public expenditures that will lead the way to providing a greater range of social, recreational, cultural and educational facilities and activities. Therefore, it is essential that the capital and operating budgets of the Town be developed to reflect and conform to the policies established in this MDP. To further aid in the implementation of various policies, the Town shall actively pursue contributions from outside sources such as other levels of government and/or private donations."

Before proceeding with the main issue of this appeal, the Board wishes to address a matter which was of some concern to the participants. The Appeal Record (Exhibit R-2) at page 87, contains a newsletter prepared by Mr. Ivan Blake on Oakmount Homeowners Association letterhead. This newsletter is a summary of Mr. Blake's impressions of what took place at the March 13, 1989, Council meeting which considered the subject development. Included in this summary is the following sentence:

> "The Association is pleased with the outcome which even the Director of Development on the evening of the vote was able to describe as a good result."

Barry Zwicker, the Director of Development is concerned about the impression made by this statement.

Aileen MacCormack and Councillors Peggy Draper and Don Huntington testified as to their recollection of the events which occurred the night of March 13, 1989, subsequent to the Council meeting in which Mr. Zwicker was reported to have made the comment.

David Bethune was recalled as he was also present at the Council meeting. His recollection of Mr. Zwicker's statement was as follows:

"If Mr. Redden accepts it, it's a good compromise."

The Board is satisfied that this is a reasonable representation of what Mr. Zwicker may have said and places an appropriate context to the statement. The Board points out that neither the Association's newsletter nor Mr. Zwicker's comment affect in any way the issue related to this case or the Board's decision.

The only issue before the Board is whether or not Council's decision "cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy" as required by Section 72(4) of the **Planning Act.**

In considering whether or not Council's decision is consistent with the M.P.S. the Board must first determine if the proposed development is consistent with the M.P.S.

From a review of all the evidence and the argument, the Board is of the opinion that the proposed development meets all of the relevant sections of Policy Z(4) of the M.P.S. Mr. Moir's report covers these relevant criteria in some detail. The Board, accepts Mr. Moir's report.

The Board has also reviewed the evidence and argument relating to the Residential Objective of the M.P.S. The Board is of the opinion that the proposed development does make "provision for high quality, mixed housing types" which "meets the need of a range of income groups." It is "economically viable and is in an environment that will enhance the character of the town and be an asset at the neighbourhood scale." The Board is satisfied that the proposed development meets this objective.

Much discussion centered around what should be considered a "neighbourhood" for the purposes of this appeal. Oakridge and Oakmount are geographically located on a triangular section of land bounded by Highway 1, Bedford Bypass and Rocky Lake Drive. On the other side of Rocky Lake Drive is Sunnyvale Subdivision which is zoned R-2 and contains a mixture of residential uses. All three subdivisions share common community services such as schools, parks, churches and community meeting places.

The Board does not intend to set a firm definition as to what would be considered a neighbourhood. Based on the evidence before it, it is the Board's opinion that no matter how broadly or narrowly neighbourhood is defined the proposed development satisfies all criteria in the M.P.S. relating to neighbourhood.

There is one section of policy Z(4) which could cause some concerns. This relates to 4(vi) - the adequacy of Street Networks ... regarding congestion and traffic hazards.

Much of the testimony and argument centered on the traffic situation as it exists today at the intersection of the Bedford Highway and Rocky Lake Drive. Transportation is obviously a major concern to the Town of Bedford as evidenced by the objective included in the Transportation Section of the M.P.S. Also included in that section is Policy T-3 which refers directly to the Rocky Lake Drive intersection.

It is obvious from the evidence that Council has spent a considerable amount of time addressing this problem. Mr. Paynter has suggested a number of possible solutions and improvements to this intersection. The matter was discussed at some length when Council considered the capital budget of the Town and provision was made in the 1989 budget for the payment of certain consulting fees. The evidence sugggests that the provincial funding should be available to the Town in one to three years. This activity is in keeping with the municipal finances section of the M.P.S.

It is obvious to the Board that the traffic flow caused by this proposed development was not a major consideration of Council at the time of making its decision. It was not one of the reasons cited by Councillor Draper in her motion. The evidence has shown that there are approximately 12,500-13,000 vehicle trips per day through the intersection. As of right, the development of Oakridge would add approximately 600 vehicle trips per day. An additional 220 trips would be added if the development agreement was approved. Council's "compromise" could result in an increase of 100 trips per day. The difference between the two positions amounts to 120 vehicle trips per day.

Based on the current situation relating to the development of improvements to this intersection, the Board believes that an extra 120 vehicle trips per day is not sufficient reason for refusing the development agreement. The Board recognizes that there comes a point of time that no more traffic can be added to an intersection. Based on its own view of the sight and comparison to other intersections in the metro area, the Board does not believe that the saturation point has been reached for this intersection.

Having determined that the proposal can reasonably be said to be consistent with the intent of the municipal planning strategy, the Board must look at the decision of Council to determine if that decision can reasonably be said to be consistent with the intent of the municipal planning strategy.

The Board has reviewed the minutes of the Council meeting of March 13, 1989. The only reasons given for the turning down of the agreement were the comments of Councillor Draper.

Evidence indicated that Councillor Draper's first reason was referring to Mr. Malcolm's report which was prepared for the rezoning application in March of 1988. The Board believes that there is some danger in relying extensively on a report which was prepared for a previous application for rezoning and not specifically for the application for a development agreement which was before Council. The Board acknowledges that many of the comments are valid but they must be weighed in light of other reports and should not be relied on exclusively. Mr. Malcolm's report dealt with all link homes and not single family bungalows with basement apartments.

Her second reason respecting laterals has no impact on the decision since double laterals are not required for the proposed development. The fact that the developer had taken it upon himself to install double laterals for each of the subject lots at his own cost has no effect on the planning matters which are before Council for their consideration, i.e. Policy Z(4).

With due respect to Councillor Draper and her desire for smaller classrooms, her objective of 18-20 pupils per teacher is not a policy of the Halifax County Bedford District Schoolboard. The Board cannot ignore the letter of Dr. J.F. Morrison included in the appeal record, in which he states the proposal "will not have a negative impact on the Waverly Road School". The Board must consider this in relation to the Policy (Z)4(4)(v).

Councillor Draper's final point related to a density of 8.7 units per acre. The Board assumes that this is reference to a comment contained in the Location part of the Residential Section of the M.P.S. where reference is made to low density being 8 units per acre. This density situation was discussed in some length during the course of the hearing, both as to its meaning and how the figure was calculated.

The Board has reviewed the Residential Section of the M.P.S. and can find no policy which limits density to 8 units per acre. The Board considers it only as a reference point from which to relate the impact of low density for an urban - semi-urban area. Had it been intended that 8 units per acre was to be a hard and fast policy the Board believes that this would have been incorporated into one of the specific policies. The Board notes that Policy R-6 which regulates apartment development provides that the density for apartment buildings shall not exceed 30 units per acre.

Mr. Zwicker indicated in his testimony that Council had also considered the matter of the traffic situation on Rocky Lake Drive, although the minutes do not show this discussion. The impact of traffic has already been discussed previously in this decision. If traffic was a major issue to Council, it is obvious to the Board that it could not have approved the other units included in the proposal.

The Board notes that it has certain information which was not presented to Council during its deliberations. This includes the three plans presented by Mr. Wallace which showed a number of lots on which R-2 type family dwellings were proposed to be constructed and which a number of the witnesses for the Interested Party admitted having seen at the time of purchase.

The Board was also provided with a number of photographs showing the subject area and the houses which are under construction. The Board had the advantage of seeing these houses which clearly have the appearance of single family homes and notes that they are an improvement on the original objection to the rezoning application of "towering" link homes.

Based on the evidence before it the Board determines that Council's decision not to enter into the development agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy.

At various times during the course of the hearing comparisons were made between owner occupied units vs. rental units. The Board wishes to make it very clear that there is nothing in the M.P.S. which permits discrimination based on rental units. vs. owner occupied units. The Board questions whether there would be any authority to enforce such a restriction. The Board notes that a number of the link homes already constructed are rented as are some of the single family dwellings located in Oakmount.

The Board wishes to emphasize that it is in total agreement with Council's attempt to affect a compromise between the developer and the Home Owner's Association. It encourages this approach as compromise is usually preferable to confrontation. The Board suggests that perhaps the recommendation to defer the motion until the developer could be consulted might have been the preferred method to follow in this case. In turning down an application for development agreement or a rezoning for that matter, Council must do so by reference to policies laid out in the town's M.P.S.

During the course of the hearing much was made of the issue of buffering between the two subdivisions. Schedule C of the draft development agreement presented to Council contained the following landscaping requirements "the rear yards of lots

33-50 are to be landscaped with topsoil, sodding and tree planting to provide a buffer or screen for the abutting lots on Rock Manor Drive". The Board has viewed the site and is of the opinion that this requirement together with the height of the ridge between the properties will provide a sufficient buffering. The Board acknowledges the statement that at the time of its viewing and the taking of pictures the trees were in foliage and that this would not be the case during a good part of the year. However the Board is of the opinion that the height of the ridge is sufficient to counteract this objection. The Board believes that this landscaped buffer on the ridge between the 2 properties is preferable to the suggested separation using the middle of Duffus Drive.

The Board acknowledges the concerns of the members of the Homeonwer's Association that no change should occur once a subdivision is in place and people have made their decision to settle based on their understanding of the zoning requirements in neighbourhood properties.

Stability in a fully developed community is, in general, desireable. When part of the community is undeveloped, changing circumstances over time require consideration of planning changes. The **Planning Act** requires community review of its M.P.S. on a periodic basis. In the interim the Act allows for change by rezoning and development agreement. The whole purpose of the **Planning Act** is to attempt to balance any conflicts that may arise.

In a well planned community developers must show concern for inhabitants' natural concern for stability. Inhabitants must respect the community's need to service people with decent living conditions commensurate with changing times.

The Board feels that in this case there is sufficient separation between the two subdivisions so that the bulk of the fears of the members of the Homeowners Association should not materialize.

In summary the Board has determined that the proposal by the Appellant can reasonably be said to be consistent with the intent of the Municipal Planning Strategy and that the decision of Council not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy.

As provided by section 72(4)(a) of the **Planning Act** the Board, therefore, refers the matter back to Council.

An Order will issue accordingly.

DATED AT HALIFAX, NOVA SCOTIA, this 28 day of July, 1989.

MICHAEL G. JOHNSON
CHAIRMAN

Linda D. Garber
LINDA D. GARBER
VICE-CHAIRMAN

NOVA SCOTIA MUNICIPAL BOARD

PART

2

MUNICIPAL BOARD DECISIONS

VOLUME EIGHT-B/1989
PART II

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON

* * * *

DOREEN A. FRIIS - Clerk

CLYDE A. PAUL, LL.B. - Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARIES AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1989 TO DECEMBER 31, 1989.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

PLANNING

CASE TABLE

Amherst (Town) & Coates Dairy Bar, Chisholm v. 9

Argand & Halifax (City), Brown v. 1

Atlantic Nurseries Ltd. & Halifax (County), Grady v. 126

Barnes v. Sydney Mines (Town) 83

Barrie v. Provincial Director of Planning 543

Barrington (District), Victoria Hotel/Motel (1986) Ltd. v. ...369

Bates/Schuhlein v. New Glasgow (Town) 194

Bedford (Town), Walsh v. 331

Bedford (Town) & Bedford Village Properties, Hattin v. 248

Bedford (Town) & Oakmount Residents Association, Redden Brothers v. 304

Bedford Village Properties & Bedford (Town), Hattin v. 248

Blom/Ferguson v. Halifax (City) 113

Brown v. Halifax (City) & Argand 1

Cape Breton (County) & MacLeod, Long/MacMillan v. 580

Chester (District), Schnare v. 441

Coates Dairy Bar & Amherst (Town), Chisholm v. 9

Colchester (County) & Saywood Development Ltd., Frizzel v. ... 29

Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Fairlanes & Kings (County), Swanburg v. 345

Ferguson/Blom v. Halifax (City) 113

Frizzel v. Colchester (County) & Saywood Development Ltd. 29

Goshen v. Halifax (City) 294

Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

Group Marketing Co-Ordinates & Yarmouth (Town), Murphy Car Sales v. 356

Halifax (City), Blom/Ferguson v. 113

Halifax (City), Goshen v. 294

Halifax (City), L & G Holdings Ltd. v. 278

Halifax (City), Rajendram v. 365

Halifax (City) & Argand, Brown v. 1

Halifax (County) & Atlantic Nurseries Ltd., Grady v. 126

Hattin v. Bedford (Town) & Bedford Village Properties 248

Kings (County), Reid v. 19

Kings (County) & Fairlanes Ltd., Swanburg v. 345

Kingston Aluminum Products Ltd. v. Truro (Town) 267

Knickle v. Lunenburg (Town) & Sweeney 102

L & G Holdings Ltd. v. Halifax (City) 278

Long/MacMillan v. Cape Breton (County) & MacLeod 580

Lunenburg (Town) & Sweeney, Knickle v. 102

MacLeod & Cape Breton (County), Long/MacMillan v. 580

New Glasgow (Town), Bates/Schuhlein v. 194

Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

Oakmount Residents Association & Bedford (Town), Redden Brothers v. 304

Provincial Director of Planning, Barrie v. 543

Rajendram v. Halifax (City) 365

Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Reid v. Kings (County) 19

Saywood Development Ltd. & Colchester (County), Frizzel v. ... 29

Schuhlein/Bates v. New Glasgow (Town) 194

Schnare v. Chester (District) 441

Swanburg v. Kings (County) & Fairlanes Ltd. 345

Sweeney & Lunenburg (Town), Knickle v. 102

Sydney Mines (Town), Barnes v. 83

Trask v. Yarmouth (District) 156

Truro (Town), Kingston Aluminum Products Ltd. v. 267

Vaughne Realty Ltd. Ltee. v. Yarmouth (Town) 471

Victoria Hotel/Motel (1986) Ltd. v. Barrington (District) 369

Walsh v. Bedford (Town) 331

Yarmouth (District), Trask v. 156

Yarmouth (Town), Vaughne Realty Ltd. Ltee. v. 471

Yarmouth (Town) & Group Marketing Co-Ordinates, Murphy Car Sales v. 356

PLANNING

STATUTE TABLE

PLANNING ACT, S.N.S. 1983, c. 9

s. 61B(3)
Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

s. 63(4)(e)
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

s. 63(7)
Reid v. Kings (County) 19
Trask v. Yarmouth (District) 156

s. 71, 72
Rajendram v. Halifax (City) 365

s. 74(2)
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

s. 7, 24(1)
Knickle v. Lunenburg (Town) & Sweeney 102

PLANNING

SUBJECT TABLE

Buffering - Development Agreement - approval to permit apartment buildings and townhouses - shadowing - quality of life
Hattin v. Bedford (Town) & Bedford Village Properties 248

Buffering - Development Agreement - refusal to enter into a permit for two 28-family units
Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Development Agreement - Council approval to permit 59 unit apartment building
Brown v. Halifax (City) & Argand 1

Development Agreement - Non-conforming use - convenience store
Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Development Agreement - Approval to permit apartment buildings and townhouses - shadowing - buffering - quality of life
Hattin v. Bedford (Town) & Bedford Village Properties 248

Development Agreement - Approval to permit 22-unit condo- pollution - architectural compatibility - Charter of Rights
Knickle v. Lunenburg (Town) & Sweeney 102

Development Agreement - Refusal to amend - jurisdiction of the Board
Rajendram v. Halifax (City) 365

Development Agreement - Refusal to enter into a permit for two 28-family units - buffering
Redden Brothers v. Bedford (Town) & Oakmount Residents Association 304

Development Agreement - Salvage yard - refusal - street frontage
Schnare v. Chester (District) 441

Downzoning - L.U.B. Amendment - Downzoning block from C-3 to R-2
Blom/Ferguson v. Halifax (City) 113

Non-Conforming Use - Subdivision - Refusal to approve - Board's jurisdiction
Walsh v. Bedford (Town) 331

Land Use By-law Amendment - Refusal to amend L.U.B. from R-1 to C-2 - convenience store
Barnes v. Sydney Mines (Town) 83

Land Use By-law Amendment - Refusal to rezone R-2 to R-3 to permit 24 condominium townhouses - Board decisions
Bates/Schuhlein v. New Glasgow (Town) 194

Land Use By-law Amendment - Downzoning block from C-3 to R-2
Blom/Ferguson v. Halifax (City) 113

Land Use By-law Amendment - R-1 to C-2 to permit convenience store - no specific proposal
Frizzel v. Colchester (County) & Saywood Development Ltd. 29

Land Use By-law Amendment - Refusal to rezone R-2P to R-2AM to permit 14-unit apartment building
Goshen v. Halifax (City) 294

Land Use By-law Amendment - Refusal to rezone R-2 to C-2 - no specific proposal - undue hardship
Kingston Aluminum Products v. Truro (Town) 267

Land Use By-law Amendment - Refusal to rezone R-2P to R-2AM to permit 14-unit apartment building
L & G Holdings Ltd. v. Halifax (City) 278

Land Use By-law Amendment - Rezoning from R-1 to C-2 to permit service station
Murphy Car Sales v. Yarmouth (Town) & Group Marketing Co-Ordinates 356

Land Use By-law Amendment - Refusal to rezone 01 to C1 - undue hardship - extraordinary and compelling circumstances
Reid v. Kings (County) 19

Land Use By-law Amendment - Rezoning from R-1 to C-1 to permit parking lot for bowling alley - buffering
Swanburg v. Kings (County) & Fairlanes Ltd. 345

Land Use By-law Amendment - Refusal to rezone G-D to G-C to permit motorcycle campground - undue hardship - extraordinary and compelling circumstances
Trask v. Yarmouth (District) 156

Land Use By-law Amendment - Refusal - lounge - accessory use to Hotel/Motel
Victoria Hotel/Motel (1986) Ltd. 369

Land Use By-law Amendment - Refusal to rezone R-1 to R-2 to permit 4-unit townhouse - minor variance
Vaughne Realty Ltd. Ltee. v. Yarmouth (Town) 471

Non-conforming Use - Development Agreement - convenience store
Chisholm v. Amherst (Town) & Coates Dairy Bar 9

Non-conforming Use - Subdivision - Refusal to approve - Board's jurisdiction
Walsh v. Bedford (Town) 331

Regional Development Permit - particular locational need or advantage - oyster hatchery - person aggrieved - expert witnesses
Barrie v. Provincial Director of Planning 543

Rezoning - R-1 to C-1 best interests - Garden Centre-environmental concerns
Grady v. Halifax (County) & Atlantic Nurseries Ltd. 126

Rezoning - Best interests of the Municipality - R-1 and A-2 to C-1 and C-2 to permit motel and campground
Long/MacMillan v. Cape Breton (County) & MacLeod 580

Subdivision - Refusal to approve - Board's jurisdiction - non-conforming use
Walsh v. Bedford (Town) 331

Undue Hardship - Land Use By-law amendment - Refusal to rezone R-2 to C-2 - no specific proposal
Kingston Aluminum Products v. Truro (Town) 267

Undue Hardship - Land Use By-law amendment - Refusal to rezone 01 to C1 - extraordinary and compelling circumstances
Reid v. Kings (County) 19

SHOPPING CENTRE DEVELOPMENT ACT, S.N.S. 1978-1979, c. 74

Shopping Centres - Expansion of existing mall - Shopping Centre Development Act, s. 6
Application by Markborough Properties Ltd. and Burnac Leaseholds 609

MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S.N.S. 1982, c. 10

Mutual Boundary - Settlement by agreement - Municipal Boundaries and Representation Act - s. 25
County of Pictou and Town of Trenton 617

WALSH v. **TOWN OF BEDFORD**

PLANNING - SUBDIVISION - REFUSAL TO APPROVE - BOARD'S JURISDICTION - NON-CONFORMING USE - PLANNING ACT S. 96, 103- BEDFORD SUBDIVISION BY-LAW, PART 5, BEDFORD L.U.B. S. 6(A).

D.W. appealed from a refusal to subdivide a lot with a 100 foot frontage. If granted, it would result in a non-conforming 2-storey, 4-unit building, on one lot and a vacant second lot. The property was zoned R-2.

HELD: Appeal dismissed.

All refusals of subdivision approval by a development officer are appealable to the Board under s. 96(3) and 103(1) of the Planning Act. However, Board is restricted by s. 103(5) from granting an appeal if it for anything other than an approval of a final plan or instrument of subdivision. In this case Board considered merits and determined that Development Officer's decision was correct. Sections of Planning Act permitting the continuation of a non-conforming use imply that use would eventually cease. The L.U.B. permits subdivision on undersized lot for any purpose permitted in the zone. A non-conforming use is not permitted in the zone. This is not an increase in the restrictions on a non-conforming use.

NSMB-11-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, ch. 9 by **DAVID WALSH** from a decision of **BARRY ZWICKER,** the development officer for the **Town of Bedford** made April 3, 1989, which decision refused to permit the subdivision of civic number 78 Rocky Lake Drive into two lots.

BEFORE: MICHAEL G. JOHNSON, Chairman

COUNSEL: LLOYD R. ROBBINS, L.L.B. on behalf of the Appellant, David Walsh

WINSTON B. COLE, L.L.B. on behalf of Barry Zwicker, Development Officer for the Town of Bedford

HEARING DATE: June 15, 1989

BRIEFS SUBMITTED: Argument - June 26, 1989
Rebuttal - June 29, 1989

DECISION RENDERED: August , 1989

DECISION: Appeal Dismissed

DECISION

The property subject to this appeal is located at 78 Rocky Lake Drive in the Town of Bedford. The Apellant, David Walsh is the owner. Located on the property is a two-story dwelling containing 4 rental units. There is also a garage situated on the property. The lot has a 100-ft frontage and a depth of slightly more than 200-ft. It is in the shape of a parallelogram. The property is zoned R-2.

The Appellant had entered into an agreement of purchase and sale for the property. Two of the conditions of this agreement were a continuation of the nonconforming use of the 4-unit dwelling and an assurance that the lot could be subdivided.

The Appellant had a variety of discussions with officials of the Town and others, and eventually made application on March 16, 1989 requesting preliminary subdivision approval for the subject property. On April 3, 1989, the Director of Planning and Development Control for the Town of Bedford refused this application for preliminary approval.

On April 14, 1989 the Board received a Notice of Appeal, appealing that decision.

David Walsh was the only witness for the Appellant. He reviewed the sequence of events from the entering into the agreement of purchase and sale for the property to the refusal of the application for preliminary approval.

Harry Soper and Barry Zwicker testified on behalf of the respondent.

Mr. Soper has been a planning technician for the Town of Bedford for the past seven years. He reviewed his involvement with the Appellant leading to the application for preliminary approval of subdivision.

Mr. Zwicker has been the Director of Planning and

Development Control for the Town of Bedford since December 1980. He also reviewed his involvement with the Appellant leading to the subject application. He reviewed in detail the various sections of the Municipal Planning Strategy (M.P.S.), the Land Use By-law, (L.U.B.) and the Subdivision By-law that he relied on in his refusal decision.

The Board is not going to discuss the differences in testimony regarding the events prior to March 16, 1989. The Board accepts the fact that on March 16, 1989, an application for preliminary approval was filed with the Development Officer.

At a brief prehearing conference held immediately prior to the commencement of this appeal, the Board raised concern about the interpretation of various provisions of Section 103 of the **Planning Act** as they might relate to this appeal. Neither of the parties felt that there was a problem and the Board proceeded with the hearing of the Appeal. Before proceeding with the merits for this appeal, the Board wishes to review this concern in more detail.

Section 103 of the Planning Act deals with the appeal process when a development officer refuses a subdivision and it states as follows:

> "(1) Where a development officer refuses to approve a plan or an instrument of subdivision, the applicant therefore may appeal the decision to the Board.
>
> (2) An appeal pursuant to subsection(1) shall be filed with the Board within fifteen days after the written decision of the development officer is served on the applicant.

(3) In considering an appeal pursuant to this Section, the Board shall determine whether the proposed plan or instrument of subdivision complies with the subdivision regulations or subdivision by-law, as the case may be.

(4) The Board shall

(a) confirm the decision of the development officer; or

(b) allow the appeal by directing the development officer to approve the plan or instrument of subdivision.

(5) Where and only where the plan or instrument of subdivision is in accordance with the subdivision regulations or the subdivision by-law, whichever is applicable, the Board shall allow the appeal.

The Subdivision By-law for the Town of Bedford provides three possible different stages for a subdivision application. Part 5 of the subdivision by-law describes the procedures and requirements for a preliminary subdivision examination (an optional first step). Parts 6 and 7 describe the procedures and requirements for approval of tentative plans of subdivision. Parts 8 and 9 detail the procedures and requirements for the approval of final plans. Parts 6 and 8 make direct reference to the appeal provisions of section 103. Part 5 does not.

There is no specific provision in Part 5 for a preliminary approval as requested by the Appellant and refused by the Development Officer. However, such a procedure is contemplated as provision is made on the Application form and Comment forms used by the Town for a subdivision approval.

Various other sections of the **Planning Act** deal with subdivisions. Section 88 states in part:

> (1) "The Minister shall prescribe provincial regulation for the subdivision of land.
>
> (2) Provincial subdivision regulations shall include
>
> > (a) procedure for approval of tentative plans of subdivision...;
> >
> > (b) requirement for approval of tentative plans;
> >
> > (c) procedure for the approval of final plans of subdivision;
> >
> > (d) requirements for approval and filing of final plans...;

Section 90(1) provides that a municipality may adopt a Subdivision By-law and Section 91(1) provides that a Subdivision By-law shall include any requirements of provincial subdivision regulations.

Section 95(1) states, in part:

> "A Council shall appoint a municipal development officer to administer its subdivision and endorse final plans of subdivision..."

Section 96 requires that application for approval of a plan be made to the development officer and also provides for duties and timing of actions by the Development Officer.

Section 96(3) sets out three options for the Development Officer. The third option in 96(3)(c) requires that within thirty days the Development Officer shall:

> "notify the applicant in writing of his decision refusing to approve the plan or instrument as submitted, which decision shall contain the reasons for refusal."

Section 96(5) refers to tentative plans as follows:

> "The approval of the lots shown on a tentative plan of subdivision lapses if the lots are not shown on the final plan of subdivision approved within two years of the date of approval of the tentative plan"

The Board cannot find any reference to a preliminary subdivision examination in the **Planning Act**.

The question arises whether or not an application for a preliminary or tentative plan of subdivision may be refused by the development officer. Do the timing provisions of Section 96 apply to preliminary and tentative applications? Does the refusal referred to in 96(3)(c) contemplate refusal at any time of a development officer?

At first review it seems reasonable to the Board that if an approval can be given then a refusal must be contemplated.

However, this leads to the further question of whether or not such a refusal of a preliminary or tentative plan is appealable to the Board. Section 103(1) appears to give the right to appeal to any refusal of a Development Officer.

Part 5 of the Subdivision By-law provides for an optional first step of an application for a preliminary subdivision examination. This part lists minimum requirements for information and documentation. It requires the Development Officer to forward the information for report to the Department of Health, the Town Engineer, and any other agency deemed necessary. The only other requirement of the development officer, at this stage, is to forward "all comments to the subdivider".

Part 5 of the by-law does not even appear to contemplate approval or refusal. In addition, there is nothing in the **Planning Act** which gives any authority for the process of a preliminary subdivision examination.

An approval of tentative plans of subdivision is recognized within the **Planning Act**. If tentative plans can be approved can the Board assumes that a refusal of a tentative plan is appealable? Section 103 (1) refers to "a plan or instrument of subdivision". It is unclear to the Board whether this phrase could be implied to include a tentative plan or if it refers only to the final plan or instrument of subdivision. If this phrase is interpreted to include a tentative plan of subdivision, or if it is assumed that all refusals are appealable, the Board must then review its powers to deal with the matter.

Section 103 (4) only allows the Board to do one of two things. It must either confirm the decision of the development officer or direct the development officer to approve the plan. Section 103 (5) restricts the Board to approving the plan only when it is in accordance with the Subdivision By-law. This certainly seems to imply that before the Board can allow an appeal the application for the plan of subdivision must meet not only all the requirements of a tentative approval but those additional ones which are required for final approval as well. Otherwise the Board could not direct the development officer to approve the plan.

In the situation of an appeal where the Board found itself in agreement with an appellant it might be in the difficult position of not being able to allow the appeal because all of the provisions of the Subdivision By-law had not been met. Such a situation would force an appellant to make a new application for final approval, based on the Board's decision.

The issue before the Board is the incompatibility of Section 96, the Application for Subdivision Approval and Section 103, the appeal process. In this case the Development Officer, within thirty days, refused an application, in writing, stating reasons for the refusal as required by 96(3)(c). An appeal was made under the provisions of 103(1) as the Development Officer had refused to approve an application.

The incompatibility occurs in 103(4) and (5) due to the powers and restriction of the Board which have already been discussed.

The Board is of the opinion that all refusals of a development officer under 96(3)(c) are appealable to the Board by virtue of 103(1).

The Board is also of the opinion that its powers are restricted by 103(4) and (5) in granting an appeal if it is for anything other than an approval of a final plan or instrument of subdivision.

Even with this restriction the Board is prepared to examine the merits of this appeal because of the reasons expressed by the Development Officer for his refusal. These reasons would be unchanged whether the application of the Appellant was at the preliminary examination stage, the tentative approval stage or the final plan approval stage. It would be unfair to the Appellant not to do so.

The Board, in deciding to review the merits of the Development Officer's decision, is limited in its powers of decision. Even if it should agree with the Appellant's position it still could not allow the appeal for the reasons already discussed. However, the Board's agreement with the appellant's position could certainly provide a firm basis on which to make application for a final plan of subdivision.

Mr. Zwicker based the refusal on his interpretation of paragraph 6 (a) of Part 5 of the Town of Bedford Land Use By-Law referring to subdivision of existing lots. This section states as follows:

> "Notwithstanding anything else in this By-law, a lot held in separate ownership from adjoining parcels on the effective date of this By-law, having less than one hundred twenty (120) feet of frontage may be subdivided to create two lots, each of which shall have a frontage of not less than fifty (50) feet and an area of not less than five thousand (5,000) square feet, providing that each lot created is serviced with municipal central sewer and water services, and any such lot may be used for any purpose permitted in the zone in which the lot is located and a building may be erected on the lot, provided that all other applicable provisions in this By-law are satisfied."

In his letter to the Appellant on April 3, 1989, Mr. Zwicker outlined his reasons for refusal in some detail. The Board quotes the following from that letter:

> "Your request for subdivision approval on the above noted lot has been considered under both the normal

provisions of the Subdivision By-law and Land Use By-Law with respect to lot frontage and lot area and, as well, consideration has been given to your proposal with respect to the utilization of Section 6(a) of the General Provisions of our Land Use By-law. As you are aware, Section 6(a) will permit, under certain circumstances, the subdivision of a parcel of land which has less than the required frontage of 120 feet and less than the required lot area of 12,000 square feet to create two new lots, each of which would have a frontage of no less than 50 feet or an area of not less than 5,000 square feet.

This provision in the Land Use By-law is to permit the subdivision of existing lots within the Town that were created prior to the coming into effect of this By-law and generally reflect the older lot sizes prior to central servicing being provided within the Town of Bedford. There are two main provisos that go along with this exception to the rule with respect to lot frontage and area which must be taken into consideration.

Firstly, the lot must be serviced with municipal sewer and water services which your property is. Secondly, that each lot created as a result of this subdivision may be used for any purpose permitted within the zone. Your property at #78 Rocky Lake Drive is presently zoned R-2. The appropriate section of the Land Use By-law, being Part 7 (which is included for your information), only provides four permitted uses within this zone. These uses being uses permitted within the R-1 Zone, a semi-detached dwelling, a duplex dwelling and a basement apartment added to a single family dwelling so that the buildings contain only two dwelling units.

At the present time, #78 Rocky Lake Drive is being utilized as a four dwelling unit building.

Given the fact that one of the newly created lots, as a result of your subdivision application, would contain the four unit dwellings; which is clearly not a permitted use within the R-2 zone; it is my position that you are not eligible for a subdivision of this parcel of land into two newly created lots utilizing Sections 6(a) of the General Provisions of the Land Use By-law."

The Board has reviewed in detail the evidence and arguments presented during this hearing. The Board wishes to make specific reference to Section 83 of the **Planning Act** which permits a continuation of a non-conforming use. Section 84, 85, 86 and 87 provide the conditions and restrictions under which this conforming use can continue. Section 87 further provides that an M.P.S. may vary these provisions and restrictions but shall not increase them.

The Board has also reviewed the general residential policies R-1, R-2, R-3 and R-4 of the M.P.S. These policies relate to the intentions of Town Council for the development of residential areas.

The Board agrees with the Development Officer that 6(a) of the General Provisions of the L.U.B. is an exception provision. According to the L.U.B. most residential lots must have a 60 foot frontage and 6000 sq. ft. Section 6(a) permits lots to be formed which have a 50 foot frontage and 5000 sq. ft. provided that each lot has municipal services. The second part of 6(a) provides a restriction that each lot may only be used for purposes permitted in the L.U.B. which in this case would be the provisions of the R2 zone.

The Board also views the provision of the **Planning Act** for non-conforming use contained in Section 83 as an exception provision. It provides for the continuation of a non-conforming use of land or structure which existed prior to the adoption of the Land Use By-Law. Subsequent sections permit the continuation of the non-conforming use but imply that the non-conforming use would eventually cease and that there would not be an increase in the non-conforming use.

Neither the L.U.B. or the **Planning Act** cover the specific situation which is before the Board, which is the application of two exception provisions to one piece of property and how these provisions relate to the permitted use of an R-2 zone as provided by 6(a).

The Appellant's proposal would result in one lot of the subdivision having a nonconforming use located on an under-sized lot. The Appellant's position is that this is an acceptable result and permitted by 6(a) of the L.U.B.and the non-conforming use Sections of the **Planning Act**.

The Appellant argues also that the refusal of the development officer to approve this situation causes an increase in restrictions and therefore is in contravention of Section 87. The Board does not believe that the provisions of Section 87 are contravened by the Development Officer's position. The Appellant may sell the property to another with the non-conforming use continuing. The Appellant may subdivide the property and convert the existing structure to R-2 provisions.

It was the Development Officer's position that one of the newly created lots "would contain the four unit dwelling which is clearly not a permitted use within the R-2 Zone", as provided by 6(a) of the General Provisions of the L.U.B. The exception provided in the **Planning Act** for a non-conforming use does not override this restriction in 6(a).

The Board notes that in his letter of April 3, 1989, the Development Officer suggested to the Appellant two other options in addition to an appeal. These were the acquisition of an additional 20 feet of frontage on Rocky Lake Drive or an application for a Development Agreement to permit the development as requested.

The Board does not agree that any increase in restrictions has occurred and is of the opinion that the Development Officer was within his rights in interpretting 6(a) of the General Provisions of the L.U.B. in the manner in which he did.

The Board confirms the decision of the Development Officer as provided by Section 103 (4)(a) of the **Planning Act.**

The Board dismisses the appeal.

An Order will issue accordingly.

Dated at HALIFAX, Nova Scotia, this 11th day of August, A.D., 1989.

MICHAEL G. JOHNSON,
Chairman

NOVA SCOTIA MUNICIPAL BOARD.

SWANBURG v. COUNTY OF KINGS & FAIRLANES LTD.

PLANNING - L.U.B. AMENDMENT - REZONING FROM R-1 TO C-1 TO PERMIT PARKING LOT FOR BOWLING ALLEY - BUFFERING - NEW MINAS M.P.S. POLICIES 16, 3.3(5)(C)(V).

The Appellant's home faces the side rather than the street. Adjacent vacant lot separated Appellant's home from bowling alley parking lot. Bowling alley applied to rezone vacant lot and erected 6-foot fence 4 feet from property line to permit parking within 15 feet of a residential zone. Fence is 18 feet from Appellant's front door.

HELD: Appeal dismissed.

M.P.S. permits rezoning of land contiguous to commercial designation on Gen.FLUM. M.P.S. requires buffers between residential development and incompatible land uses. L.U.B. identifies commercial parking lots as incompatible with residential zones and requires fencing or screening.

Note: Leave to appeal to Nova Scotia Supreme Court, Appeal Division granted. The appeal was dismissed.

NSMB-13-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **PAUL and LILLIAN SWANBURG** from a decision of the Council of the Municipality of the **COUNTY OF KINGS** dated April 4, 1989 which rezoned property on Roy Avenue from R1, Residential One and Two Family Zone to C1, Major Commercial Zone on the application of **FAIRLANES LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman,

COUNSEL: WILLIAM COX, Q.C., and BRIAN TABOR, LL.B for the Appellants,

JAMES DEWAR, LL.B., for the Municipality of the County of Kings,

ALAN TUFTS, LL.B., for Fairlanes Ltd.

HEARING DATE: June 29, 1989

BRIEFS SUBMITTED:
July 14, 1989 by the Appellants
July 26, 1989 by the Applicant
July 28, 1989 by the Municipality
August 3, 1989 by the Appellants

DECISION DATE: August 16, 1989.

DECISION: APPEAL DISMISSED.

DECISION

Paul and Lillian Swanburg built a large home on Roy Avenue in New Minas, 17 years ago. They placed their home so the front door faced the adjacent vacant lot, (the subject property) to the north rather than the street. Next to the subject property is a bowling alley which fronts on Commercial Street. At the time they built their home, the Swanburgs knew the vacant lot was under option to the previous owners of the bowling alley. It was later bought by the bowling alley. For the past 17 years Mr. Swanburg has maintained the subject property by cleaning the garbage and mowing the lawn. It gave the appearance of being part of his front lawn.

Fairlanes Ltd. owns the bowling alley. Fairlanes expanded the building in 1988. Following the expansion, the company decided to increase the number of parking spaces beyond what is required under the Land Use By-Law ("L.U.B."). This would help eliminate on-street parking by Fairlanes' customers. Fairlanes intended to use the subject property, which has 96 foot frontage on Roy Avenue and extends 242 feet from the street in front of the Swanburg residence, for the additional parking.

The bowling alley property is designated as part of the Business District on the Future Land Use Map in the Municipal Planning Strategy ("M.P.S.") and is zoned C1, Commercial Zone. The subject property was zoned R1, Residential and Two Family Zone.

In October 1988, the company applied for rezoning of the subject property from R1 to C1, Commercial Zone. Fairlanes Ltd. did not advise the Swanburgs of their application to rezone the property and intention to change the use of the lot. Instead the Swanburgs learned of the proposed rezoning when a 6 foot high fence was erected four feet from their boundary line along the depth of the lot.

The fence is 18 feet from the Swanburgs' front door. The reason for the fence is that under the L.U.B. any parking area in a commercial zone within 15 feet of a lot line abutting a residential zone must be fenced or screened. The Swanburgs were disturbed by the fence which blocks the view from their living room window. They were also concerned because the company had not discussed the matter with them.

The company removed the existing grass and top soil from the subject property and replaced it with gravel. During the 1989 spring thaw, Mr. Swanburg noted large pools of water collecting on his lawn. He believes they have been caused by Fairlanes' reducing the grade and graveling the lot. He introduced photographs which showed ridges running down from the fence.

Once the fence was in place, people began parking by it until the Municipality ordered it stopped because the lot was still zoned residential. The Swanburgs objected to the parking. They said that they became more aware of activity at the bowling alley when parking occurred by the fence. When the lot was unavailable for parking, they did not notice the noise as much. The Appellants led evidence that the value of their property will be devalued by the rezoning.

After receiving the rezoning application, Elaine Mitchell, a Development Planner with the Municipality, prepared a

Staff Report recommending approval of the proposed rezoning.

The New Minas Area Advisory Committee considered the application on December 13, 1988. The Committee expressed concern about the fence but concluded that it was legal and met the criteria of the by-law. The Committee recommended approval "subject to a negotiation with regard to an acceptable buffer".

The Planning and Recreation Advisory Committee of the Municipality considered the application on December 14, 1989. The Committee deferred its decision and requested staff to meet with the parties and "come to a compromise on the provision of suitable buffering".

On January 13, 1989 representatives of the parties met with Ms. Mitchell. She prepared a report of the meeting. The Swanburgs requested that the fence be removed and replaced with a hedge. They raised concerns about flooding caused by runoff from the parking area. Fairlanes were unwilling to remove the entire fence given that it cost almost $4,000.00 to build. The company was prepared to remove 50 feet of the fence but not to pay for a hedge.

According to the Minutes of the February 8, 1989 meeting of the Planning and Recreation Committee, the Committee was told that the parties had reached an agreement regarding buffering. (This later proved not to be the case.) The Minutes state the Swanburgs' " main concern was parking encroaching their home thus causing their property to devaluate". The Committee recommended approval of the proposed rezoning.

In addition to holding a public hearing, Council received written submissions from counsel for both parties and permitted them to speak at the April 4, 1989 Council meeting. All issues were thoroughly addressed. Council then approved the rezoning.

While there is no doubt that the Swanburgs would prefer that the fence be removed, their position is that it is the use of the land for commercial purposes and the lack of a proper buffer and not the fence that bothers them. It is recognized that whether or not the subject property is rezoned, the owners of the lot have the right to place a 6 foot fence on the property line. In this case, the fence has been placed 4 feet from the property line.

The Board has reviewed all the material which Council had before it. While the Planner's Report does not deal specifically with all the criteria set out in Implementation Policy 5 of the New Minas Sector Plan, the issues were fully discussed by the lawyers representing the parties before Council.

The Board has reviewed the New Minas Sector Plan which is the applicable municipal planning strategy ("M.P.S."). The following policies are particularly relevant to this appeal:

> **"2.2 GENERAL POLICIES**
>
> 1. (iii). Map #1 is the official Future Land Use Map for the Village of New Minas. The Land Use Map is a graphic representation of the land use districts which are to be developed in accordance with the policies of this Plan. Areas contiguous to a given district may be considered for rezoning without

any amendment to this Plan if they are interpreted as strictly adhering to the Policies of this Plan.

2.3 RESIDENTIAL POLICIES

15. It shall be the policy of Council to ensure the provision of off-street parking in residential areas.

16. It shall be the policy of Council to request the provision of buffers between residential development and railroads, expressways and land uses that are incompatible with residential uses.

3.3 AMENDMENT TO LAND USE BY-LAW

5. In considering amendments to the Land Use By-Law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:

a) That the proposal is in conformance with the intent of this Plan and with the requirements of all other Municipal By-laws and regulations.

b) That the proposal is not premature or inappropriate by reason of:

i. the financial capability of the municipality to absorb any costs relating to the development;

ii. the adequacy of sewer and water services and utilities;

iii. precipitating, or contributing to a pollution problem in the area;

iv. the adequacy of storm drainage and the effect of same on adjacent uses;

v. the adequacy and proximity of school, recreation and any other community facilities;

vi. the adequacy of road networks in, adjacent to, or leading to the development;

vii. the potential for the contamination of watercourses or the creation of erosion or sedimentation;

viii. creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.

(c) That where provided for in the Plan, controls be placed on the proposed development to reduce conflict with any other adjacent or nearby land use by reason of:

i. type of use;

ii. emissions including air and water pollutants and noise

iii. height, bulk and lot coverage of the proposed building

iv. traffic generation, access to an egress from the site, and parking;

v. buffering, landscaping, screening, and access control;

vi. open storage;

vii. signs;

viii. similar matters of planning concern.

(d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors."

The Land Use By-law ("L.U.B.") contains the following parking requirements in the C1 Zone:

"5.4.2-3 (a) Parking General

(iii) no parking area shall be located within fifteen (15) feet of a lot line abutting a residential zone or a park in a R1, R2 or R3 Zone, or P1 Zone unless the parking area is fenced or screened."

The words "buffers", "buffering" and "screening" are not defined in either the M.P.S. or L.U.B.

Essentially the argument in this appeal is whether or not on a rezoning application a 6 foot fence, four feet from the property line, is an adequate buffer between a commercial use and a residential use.

Mr. Swanburg believes that the vacant R1 lot is the proper buffer. He believes that it would be fine if someone else built a house on that lot because they would know what they were living next to. Presumably, he feels that a 6 foot fence would be satisfactory in that case.

The Board has difficulty with Mr. Swanburg's argument. He knew when he built his home that the bowling alley had an option to purchase the vacant land. He knew the land he was maintaining as an extension of his front yard was not his. Why would a 6 foot fence be an adequate buffer for the adjacent lot but not for his property?

The M.P.S. and L.U.B. regulate adjacent conflicting uses. For example, the L.U.B. has a standard for commercial parking areas adjacent to residential zones. Does the M.P.S. require a different standard for a rezoning application if all other conditions are met?

Policy 5 permitting rezonings refers to buffering in Section (c)(v). It reads:

> "(c) That where provided for in the Plan, controls be placed on the proposed development to reduce conflict with any other adjacent or nearby land use by reason of:
>
> > (v) buffering, landscaping, screening and access control."

As written it makes no sense. Buffering does not cause conflict with adjacent land uses. The Board assumes that the words "the lack of" should be added to the beginning of the clause. All of the other clauses in section (c) refer to matters which may cause conflict with adjacent land uses. The Board further assumes that the intent of the clause is to require some form of "buffering, landscaping, screening and access control" to reduce conflict where such controls are called for in the M.P.S.

Policy 16 under 2.3 Residential Policies requires buffers between residential development and land uses that are incompatible with residential uses. The L.U.B. has identified a commercial parking lot within 15 feet of a residential zone as an incompatible land use and requires fencing or screening as the buffer.

Council was fully advised that the issue of buffering was in contention. Council, in approving the rezoning, obviously felt that the fence was an adequate buffer. No doubt Council also took into account that by approving the rezoning it was also following Policy 15 and ensuring the provision of off-street parking in a residential area.

The Appellants invite the Board to find that this fence is not an adequate buffer. While the Board is inclined to agree with the Appellants, that is not the function of the Board. The Board must determine whether or not the decision of Council is reasonably consistent with the intent of the M.P.S. In this case the M.P.S. permits rezonings of land contiguous to the Commercial designation on the Future Land Use Map without an amendment to the M.P.S. The M.P.S. calls for the provision of buffers and the L.U.B. has said a fence or screen is the required buffer for a parking lot located within 15 feet of a residential zone.

The Board cannot find that the decision of Council is inconsistent with the intent of the M.P.S.

The Appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of August, A.D., 1989.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD.

KEN MURPHY CAR SALES ET AL v. TOWN OF YARMOUTH AND GROUP MARKETING CO-ORDINATES

PLANNING - L.U.B. AMENDMENT - REZONING FROM R-1 TO C-2 TO PERMIT SERVICE STATION - PLANNING ACT, S. 61B(3).

Council approved a rezoning which permitted a service station including a convenience store on Starr's Road and Pleasant Street. Two of the Appellants operated businesses nearby which would compete with the service station or convenience store. The Gen.FLUM designated the area General Commercial.

HELD: Appeal dismissed.

The M.P.S. does not require that like businesses be spaced throughout area. Nothing prohibits like businesses being established next to existing businesses.

NSMB-20-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **KEN MURPHY CAR SALES LTD., SUM GOOD STORES LTD. and KENNETH MURPHY** from a decision of **YARMOUTH TOWN COUNCIL** made June 8, 1989, which approved an amendment to the Town's L.U.B. by rezoning property located on the west side of Pleasant Street from R-1 to C-2 to permit a service station on the application of **GROUP MARKETING CO-ORDINATES (1987) LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: RICHARD MURPHY, LL.B., for the Appellants;

ROBERT GRANT, LL.B., for the Applicant, Group Marketing Co-Ordinates (1987) Ltd.;

GREGORY WARNER, Q.C., for the Town of Yarmouth.

HEARING DATES: August 15, 1989.

DECISION DATE: September 11, 1989.

DECISION: **Appeal Dismissed.**

DECISION

The Town of Yarmouth identified four separate commercial districts in the recently amended Municipal Planning Strategy ("M.P.S."). The M.P.S. designates Starr's Road and Pleasant Street as the focus of the General Commercial District.

This appeal concerns two properties on the west side of Pleasant Street near the Starr's Road intersection which is within the General Commercial District. Group Marketing Co-Ordinates (1987) Ltd. ("Applicant") owns the two properties. They form part of a corner lot consolidation on Starr's Road and Pleasant Street, approved on March 9, 1989. These two properties were zoned R-1 Residential while the balance of the lot is zoned C-2 General Commercial.

Sum Good Stores Ltd., one of the Appellants, operates a large convenience store on Starr's Road adjacent to the Applicant's corner lot. The principal shareholder of Sum Good Stores Ltd. is John Miller. He was the sole witness called by the Appellants.

Ken Murphy Auto Sales Ltd. and Ken Murphy are the other two Appellants. Ken Murphy Auto Sales Ltd. operates an Esso Service Station on the opposite corner of Starr's Road and Pleasant Street.

On April 19, 1989, the Applicant applied to rezone the two properties to C-2. The reason given for the rezoning was "construction of new service station facility". No plans were enclosed with the application. On the same date the Applicant applied for a Municipal Development Permit for "new service station facility" on the consolidated lot. The plans included with the application for a development permit showed a convenience store as part of the service station.

The Town of Yarmouth did not have the services of a Town Planner and Development Officer between March 9, 1989 and May 15, 1989. Both applications were forwarded to the Planning

Advisory Committee ("P.A.C.") for consideration at the May 9th meeting. P.A.C. recommended a public hearing for the rezoning application. P.A.C. approved the application for a development permit. The permit was issued on May 10, 1989.

Council scheduled a public hearing for June 8, 1989. The advertisement showed the two properties and stated that the rezoning was "to construct a new service station facility". No reference was made to the larger consolidated lot.

On May 15, 1989 the Town hired Richard Mills as Town Planner and Development Officer. He prepared two brief reports of the proposed rezoning before the June 8th hearing. He recommended approval of the rezoning provided the two properties were consolidated. After he prepared his reports, he learned of the larger lot consolidation. His reports make no reference to the issuance of the development permit.

On May 19, 1989, John Miller of Sum Good Stores Ltd. wrote to P.A.C. opposing the approval of the development permit because of the convenience store. He outlined his belief that like businesses should be spaced throughout the community. He feels like businesses should not be permitted to develop adjacent to an existing business.

Mr. Miller did not attend the Public Hearing. No one objected to the rezoning. Following the Public Hearing, Council approved the rezoning from R-1 to C-2 "providing consolidation takes place". Council was not aware that the larger lot consolidation had already received approval.

The Notice of Appeal lists three grounds of appeal summarized as follows:

> "1. Council's decision is inconsistent with the M.P.S.
>
> 2. The property does not meet the minimum lot area and frontage requirements under the Land Use By-law ("L.U.B.").
>
> 3. The Notice of Public Hearing in the newspaper did not give a complete synopsis of the proposed amendment and reasons for it."

Dealing with the second ground, the lot consolidation cured any defect that might have existed about the minimum lot area and minimum frontage.

Section 61B(3) of the **Planning Act** sets out the requirements for the Notice of the Public Hearing in the newspaper. The Appellants argue the notice should have made reference to a convenience store and not just a service station facility. The Applicant and the Town argue that modern service station facilities include convenience stores and no one was misled by the description. There is no definition of a service station facility in the L.U.B. The advertisement is consistent with the information contained on the application form and appears to meet the requirements of s. 61B(3).

The major ground of appeal is that Council's decision is inconsistent with the M.P.S. Mr. Miller suggested that Council should have entered into a development agreement rather than rezoning the land. A review of the M.P.S. and L.U.B. shows Council cannot enter into a development agreement in the C-2

Zone.

The M.P.S. makes Starr's Road and Pleasant Street the focus of the General Commercial future land use designation.

The following M.P.S. policies are relevant:

> "2.2.4 It shall be the intention of council to zone all existing commercial uses and any vacant serviced lots which conform with the minimum lot frontage and lot area requirements within the General Commercial generalized future land use designation as General Commercial C-2. Vacant unserviced lands within this designation shall be zoned in accordance with Commercial Policy 2.2.6 All other lands shall be zoned according to their use.
>
> 2.2.7 It shall be the intention of council to consider proposals for "infill" type general commercial development (C-2 uses) on lands designated General Commercial and zoned R-1 or I-1 by amendment to the Land Use By-law and subject to the following:
>
> 1. That the lot meet the minimum lot frontage and lot area requirements for "infill" lots as identified in the Land Use By-law;
>
> 2. Conformity with criteria contained in Implementation Policy 6.8.
>
> 6.8 It shall be the intention of Council in considering amendments to the Land Use By-law, in addition to all other criteria as set out in various policies of this Municipal Planning Strategy, to have regard to the following matters:
>
> 1. That the proposal is in conformance with the intents of this Strategy;
>
> 2. That the proposal is not premature or inappropriate by reason of:
>
> A) The financial capability of the Town to absorb any costs relating to the development;
>
> B) The adequacy of sewer and water services to support the proposed development;
>
> C) The adequacy and proximity of school, recreation and other community facilities;

D) The adequacy of road networks in, adjacent to, or leading to the development;

E) The potential for the contamination of watercourses or the creation of erosion or sedimentation;

F) The potential for damage to or destruction of historical buildings and sites;

3. That adequate requirements are contained in the Land Use By-law to reduce conflict between the development an any other adjacent or nearby land use by reason of:

A) Type of use;

B) Height, bulk, and lot coverage of the proposed building;

C) Traffic generation, access to and egress from the site, and parking;

D) Open Storage;

E) Signs;

F) Provision is made for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic;

G) Development is located so as not to obstruct any natural drainage channels or watercourses;

H) Similar matters of planning concern;

4. Suitability and development costs of the proposed site in terms of steepness of grades, soil and geological conditions, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors."

Council zoned the subject properties R-1 in accordance with Policy 2.2.4. The surrounding uses are all C-2. With the lot consolidation, the property meets the requirements for infill lots identified in the L.U.B.

The Appellants did not argue that the proposed rezoning did not comply with the requirements of Policy 6.8. There was some suggestion that Council might have been mislead by the description of a service station facility. It was suggested Council did not realize a convenience store and car wash were planned in addition to gas pumps.

Mr. Miller also expressed concern that Irving Oil Ltd. was buying the land from the Applicants. He alleged that Irving had acted in bad faith on an earlier rezoning application. The Applicants intend to vacate their existing Irving service station on Starr's Road. They will lease this new facility if the rezoning is approved.

The Board notes that the application for the development permit includes a plan showing the proposed development. At least some of the members of Council sat on P.A.C. when this matter was discussed. Although the Minutes are brief, evidence at the Board hearing showed that Council was advised of the plans at the Public Hearing.

The Board asked the Town's solicitor, Mr. Warner, if there was any concern that Council was misinformed. He assured the Board that Council stood by the rezoning.

Mr. Miller may be correct in suggesting that in some municipalities in North America, planning documents require spacing of like businesses. The M.P.S. for the Town of Yarmouth has no such requirements. The M.P.S. has established specific areas for commercial development within the Town and specified the types of commercial activities permitted. Service stations and retail shops are both permitted.

The Board is satisfied that Council's decision is reasonably consistent with the intent of the M.P.S.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of September, A.D., 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RAJENDRAM v. CITY OF HALIFAX

PLANNING - DEVELOPMENT AGREEMENTS - REFUSAL TO AMEND- JURISDICTION OF THE BOARD - PLANNING ACT s. 71; 72.

A preliminary hearing to determine if the Board has jurisdiction to hear an appeal from a refusal by Council to amend an existing development agreement.

HELD: The Board has no jurisdiction to hear the appeal.

The juxtaposition of sections 71 and 72 make the legislative intent clear. Section 71 allows appeals from the approval of amendments to existing development agreements while section 72 does not allow appeals from the refusal to amend existing development agreements. The Board has no authority to add or imply the words "or an amendment to such an agreement" to section 72(1).

NSMB-18-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **STEVE RAJENDRAM** from a decision of **HALIFAX CITY** Council refusing to amend a development agreement respecting 2650 Dublin Street.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: BRIAN CHURCH, Q.C., for the Appellant;

GERALD GONEAU, L.L.B., for the City of Halifax.

PRELIMINARY HEARING: September 25, 1989.

DECISION DATE: September 29, 1989.

DECISION

The Board held a preliminary hearing on September 25, 1989, to determine if it has jurisdiction to hear this appeal under the **Planning Act**.

On September 15, 1981, Hage Enterprises Ltd. and the City of Halifax signed a development agreement respecting 2650 Dublin Street.

Steve Rajendram is a successor in title to Hage Enterprises Ltd. He wishes to build an addition to the building located on the lot at 2650 Dublin Street. He applied to Council to amend the development agreement as permitted under the Planning Act.

Council held a public hearing as required. On May 25, 1989, Council voted to deny the application to amend the agreement.

Sections 71 and 72 of the Planning Act concern development agreement appeals. Section 71(1) permits appeals from Council's approval of a development agreement or an amendment thereto.

Section 72(1) allows an appeal by an applicant where Council has refused to enter into a development agreement. Section 72 makes no reference to Council's refusal to agree to an amendment of a development agreement.

The City argues that the Board has no jurisdiction to hear the appeal. The Applicant counters that the Board can read in the words "or an amendment to such an agreement" to Section 72(1). In the alternative, the Applicant argues that the amendment could be treated as a new development agreement.

There are eight subsections to section 72. They all deal with the entering into of a development agreement and none make reference to an amendment of such an agreement.

As stated above, section 71 makes specific reference to amendments to development agreements. The juxtaposition of these two sections makes the legislative intent clear. Section 71 allows appeals of amendments while section 72 does not.

The Board has reviewed the **Planning Act** and the

Municipal Board Act and is unable to find any authority which would permit it to add or imply the words "or an amendment to such an agreement" to Section 72(1).

In preparation for this appeal the City prepared an Appeal Record. The documents contained in it show that all parties treated this as an amendment to an existing development agreement and not a separate development agreement. The Board finds on the facts that it can treat this as a new agreement.

The Board therefore concludes that it has no jurisdiction to hear this appeal.

DATED at HALIFAX, Nova Scotia, this 29th day of September, A.D., 1989.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

VICTORIA HOTEL/MOTEL (1986) LTD. v. DISTRICT OF BARRINGTON

PLANNING - L.U.B. AMENDMENT - REFUSAL - LOUNGE - ACCESSORY USE TO HOTEL/MOTEL - C-1 ZONE - PLANNING ACT, S. 2(b), (c), (d), 38(2), 53(3), LIQUOR CONTROL ACT, S. 162.

The Appellant operates a hotel/motel in Barrington Passage and wished to add a 200 seat lounge. The L.U.B. did not permit lounges, only licenced restaurants. Many residents objecting to the proposed lounge, some on religious grounds. The Planner recommended approval.

HELD: The Appeal is allowed and Council was ordered to amend the L.U.B. to permit "lounge" as an accessory use to a hotel/motel in the C-1 zone.

In passing the original M.P.S. Council intended to honour the religious and moral views of a large portion of the community. The Board believes Council's refusal was based largely on the moral/religious views of its constituents. Council must decide for good planning reasons. The M.P.S. encourages the upgrading and encouragement of tourism. The consideration of religious views as the determinant cannot be supported by the intent of the M.P.S.

There should not be any unilateral communication by any person with the Board after the conclusion of the evidence.

NSMB-17-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **VICTORIA HOTEL/MOTEL (1986) LTD.** from a decision by the **BARRINGTON MUNICIPAL COUNCIL** made on May 24, 1989, refusing to amend the Land Use By-law affecting permitted uses in the Central Business District (C-1) Zone in the Municipality of the District of Barrington to permit a lounge as an accessory use to hotel/motel in the Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: CLYDE L. NICKERSON, LL.B., on behalf of the Appellant, **VICTORIA HOTEL/MOTEL (1986) LTD. (Jacquline Hewitt)**;

IRVING PINK, Q.C., and D. HARDING, LL.B.,on behalf of the Respondent, the **MUNICIPALITY OF THE DISTRICT OF BARRINGTON.**

HEARING DATES: August 3, 1989.

DECISION DATE: November 10, 1989.

DECISION: Appeal Allowed.

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, c. 9, from a refusal decision of the Council of the Municipality of the District of Barrington. Council refused to allow a generic change in C-1 Zone in Barrington Passage. The change would have permitted "lounge" as an accessory use to a hotel/motel in the Central Business District (C.B.D.)

The Victoria Hotel owned by the Appellants, is the only hotel/motel in the C.B.D. The practical effect of the amendment would allow the Appellant to add a lounge to the Victoria Hotel.

Under Section 16(1), the **Municipal Board Act**, S.N.S. 1981, c. 9, the Chairman assigned Board Member, Richard L. Weldon to hear this appeal.

The Appellant is a body corporate. It owns or has effective control over a hotel/motel complex lying to the south side of highway number 3 in the District of Barrington. For planning purposes this area goes by the name "Barrington Passage Corridor, Rural Centre, zoned C-1, C.B.D.".

The Land Use By-law (L.U.B.) defining the permitted uses in the C.B.D. zone includes "hotel", "motel" and "restaurant". All now exist in the complex owned by the Appellant. The L.U.B. does not include any reference to "lounge". Under the L.U.B., a lounge **may** therefore be a prohibited use within the C-1 Zone.

The Appellant's hotel building frontage on the highway is in the most densely commercial portion of the C.B.D. It is to the south side of the highway. In the immediate area, adjacent buildings occupy a great deal of the street frontage. One enters the hotel grounds by passing beside the existing hotel and restaurant building that fronts on the highway. One progresses to the parking lot of this complex through a large driveway leading south from Highway 3 towards the CNR right-of-way. Behind the hotel building is located a 10-unit motel, also part of the complex. There are vacant lands, in the proximity of the existing motel units, proposed for development. The proposed development on these vacant lands would contain an additional 20-unit motel and a 200-seat free-standing lounge. The hotel contains, at the present, a 60 seat licensed restaurant. This site is also serviced by two other driveways (the legal nature of which is uncertain). There are presently three visible vehicular exits from the subject site.

Council turned down the application for the generic change in the zoning on May 24, 1989. The Appellant filed a Notice of Appeal dated the 13th day of June, 1989. The Appellant delivered it to the Board on June 13, 1989.

No one objected to the jurisdiction of the Board to hear this planning appeal. The Board determined, on the evidence before it, that it had jurisdiction to hear this appeal.

In its Notice of Hearing the Board also allowed for an evening meeting at 7:00 p.m. At this evening meeting unrepresented citizens who were not parties would have priority to express their views. The Board held the scheduled 7:00 p.m. meeting. Many of the people from the area appeared at this time. Many gave evidence before the Board under Section 27(3) of the **Municipal Board Act**.

The Board commenced its 10:00 a.m. sittings on August 3, 1989. The sittings continued at the Council Chambers of the Municipality of the District of Barrington at Barrington Passage, Nova Scotia.

The Board viewed the site. The Board heard argument from all parties who appeared. Many people gave evidence under oath.

Jacqueline Hewitt testified first for the Appellant. Mrs. Hewitt said she was the sole owner and President of the Appellant. She had been operating the hotel/motel company on the property for three years. In that three years, the business had expanded. She lives in the premises with her husband. Mrs. Ashbey, one of her employees, manages the Appellant's business. Mrs. Hewitt proposed to increase the business first with a lounge. On its success, she would then increase the number of motel units. Eventually, when finances permitted, she would add a marina. She proposed a three phase development.

In view of this desire, the Appellant applied for a building permit or development permit from the Municipality of Barrington. Mrs. Ashbey does this type of administrative work for the Appellant. Mrs. Hewitt knew the cost of the lounge and motel would be $300,000.00 or $400,000.00. She said that kind of money was available to the Appellant.

Mrs. Hewitt appeared to leave the responsibility of the business affairs of the Appellant to other persons, including Gloria Ashbey.

Mrs. Ashbey testified. She said she was the accountant/general business manager for the Victoria Hotel. She said the hotel had been providing entertainment for the past two and one half years on Friday nights. The Friday night entertainment scheme was so successful that a clash of services between the entertainment and the dining facilities became apparent. She said there was a demand in the Barrington Passage area for this lounge-like service for the people. She said the nearest existing lounges were in Shelburne and in Yarmouth. She said the proposed motel/lounge increase would give about 14 additional people permanent employment with the Appellant. She says lounge profits, once established, would allow the Appellant to invest in the proposed second phase, 20 motel units.

In some indefinite future time, the Appellant would also like to promote a marina.

Mrs. Ashbey said about 90% of the hotel/motel's business in the summer time was from tourists using the motel units. She felt tourism would increase (the tourist's average stay would last longer) should the Appellant provide on-site lounge service. The Appellant's proposed lounge seeks to seat 200 people, according to Mrs. Ashbey. "Many people, once you tell them it is a dry community, decide to go somewhere else".

The marina seemed to be a much more obscure objective. Mrs. Ashbey had not planned it in nearly as much detail.

Mrs. Ashbey has made herself familiar with the specific requirements the Liquor License Board imposes on a lounge operation. After the zoning were changed, accommodating lounge use, the Appellant would still have to apply for a lounge license.

Mrs. Ashbey has said that she has worked at the Victoria Hotel for the last two or three years. In that time only one complaint to the police of rowdiness occurred.

Mrs. Ashbey says that the Appellant can get permission from the Canadian National Railway, to use that Company's rights-of-way. The Appellant needs to use certain C.N.R. lands to make it easier to get in and out of the hotel properties. It needs their use should it build the lounge.

Mrs. Ashbey said she learned the restaurant business, by experience, on this job.

Mrs. Ashbey attended the public hearings held by Council to discuss the proposed amendment to allow lounges in C-1 zones. The proposed amendment allows "lounge" as an accessory use to hotels and motels. She said there were about 60 to 65 people in attendance in the audience, all against it. Members of the public asked Council to make the decision there and then. She said Council had made the decision there on the spot. Mrs. Ashbey felt the main objection expressed by the people present at this public hearing was that they didn't want liquor. They don't want any more premises for serving alcoholic beverages in the municipality.

Ralph Niessen was the next witness. Mr. Niessen had formerly been in an economics teaching position. He writes, freelance, on economic matters. Mr. Niessen had done a study for another entrepreneur, Hospitality Inns - (the Ship's Wheel of Barrington Passage). He studied the feasibility of setting up a lounge in the area on their behalf. Mr. Niessen formed the opinion there was a demand for a lounge within the population base available to it.

With those witnesses, Mr. Nickerson, Counsel for the Appellant, ended the case for the Appellant.

Mr. Pink's (Counsel for the Municipality) first witness was John Richard Fry, the Municipal Clerk and Treasurer for the Municipality. Mr. Fry has been Municipal Clerk and Treasurer for 25 1/2 years.

Mr. Fry explained to the Board the planning process and meeting process that lead up to the existing Municipal Planning Strategy (M.P.S.) and concomitant L.U.B. He said the Municipality started taking an interest in planning matters in 1975. It then brought in a building by-law and mobile home by-law and thus got into the planning field. Serious planning, he said, started in 1981 or 1982. Mr. Fry said he gained assistance from a lone planner from the Department of Municipal Affairs, Gary Saunders. Council, he said, passed the M.P.S. and the L.U.B. together. The Minister approved them together.

Mr. Fry said this rural community planning was a very difficult process. It was hard to obtain public interest in the drafting process. If issues raised public interest, he experienced some difficulty in confining the public's interests to planning matters.

Mr. Fry described the Victoria Hotel property as being in the middle of a 1000 foot C.B.D. It contains the only restaurant in the C.B.D. Mr. Fry said there were only a few residential houses in the C.B.D.

Mr. Fry said "lounge" was not one of the permitted uses listed in the L.U.B. for the C-1 Zone. The L.U.B. is in the usual form. The L.U.B. permits only listed uses.

Mr. Fry said that the Council, in drafting the M.P.S., entered into an exhaustive discussion on the merits of the uses permitted. Council arrived at the consensus that the L.U.B. should not list "lounge" as one of the permitted uses in the C.B.D. (C-1) Zone. There were no lounges then existing. There are none today.

Mr. Fry said this:

> "the decision of the Committee and the recommendation of the Committee was eventually adopted by the Council and the list did not include lounge...with a belief that at some future date there would be a request for such an establishment and full awareness that the document is not going to be perfect...I think to be perfectly honest...there was a concern on the part of members of the Committee because of the well known attitudes within the area pertaining to liquor that we would probably have a much more difficult time getting the Planning Strategy and Land Use By-law approved by Council, approved in public hearings, if we incorporated into that document lounges. I think it would have been like waving a red flag in front of a bull and I think the community did not want to...realizing that it would have been a very controversial matter...".

Mr. Fry felt a great number of the public opposed "lounge" at the time Council passed the L.U.B./M.P.S.

In respect to this particular application, the Planning Advisory Committee (P.A.C.) recommended that Council amend the list of permitted uses in the C-1 Zone in the L.U.B. to include "lounge". "Lounge" would be an accessory use to hotels and motels only.

Mr. Fry would not conjecture on why Councillors voted at Council as they did. Mr. Fry said there were seven Councillors in attendance at the public hearing. He knew that Council carried the motion to refuse. He deliberately did not remember what the vote was carrying the motion to refuse the application to make the generic rezoning.

Mr. Fry said both planner and P.A.C. recommended Council add "lounge" as an accessory use to "hotel/motel". This was in the C-1 Zone Policy. Mr. Fry conceded there was a widespread public aversion to liquor dispensing establishments. In his view, the L.U.B./M.P.S. would not have passed in the first place with "lounge" and "tavern" in the list of C-1 Zone permitted uses. He admitted the Councillors then discussed mainly a free standing type of lounge and/or tavern operation. They did not discuss the accessory use "lounge" attached to a hotel/motel use.

Mr. Fry said "I personally find it a little difficult to consider a lounge as a truly tourism operation".

Mr. Fry lacked the qualifications to answer whether or not "lounge" would be an accessory use to "hotel/motel". He said that was a question the development officer would have to deal with. Mr. Fry felt the Development Officer would consider the question of whether or not "lounge" was an accessory use to "hotel/motel". The Development Officer would then probably seek legal advice. Mr. Fry felt that the Development Officer also had insufficient qualifications to answer that legal question.

Mr. Fry reiterated that he felt Council could not have included lounges in the original M.P.S./L.U.B. which the Minister approved.

> "There were no lounges in the area so it was not something that had to be incorporated in the zone because it already existed...a lounge or tavern as a permitted use...would have immediately got opposition and it would have jeopardized...I personally feel the entire process."

Mr. Fry conceded that it was the intention of the M.P.S. to permit zoning amendments. He said many amendments had been granted to the L.U.B. extending the list of permitted uses. Generic rezonings have occurred.

As to a "lounge" amendment, Mr. Fry said:

> "When the day ever came that somebody wanted a lounge, they would have the right to make the application, the Council of the day would have to deal with the matter-if and when the occasion arose."

Mr. Fry conceded that the present application to amend the L.U.B. was consistent with the M.P.S.

Mr. Fry had no idea whether or not the financing, which the Appellant said it had, was good or not.

Gary Steven Saunders, Planner, was the next witness. The Yarmouth/Argyle/Barrington District Planning Commission (D.P.C.) employs him. As part of his duties, he serves as planner for the Municipality.

Concerning the preparation of the original

M.P.S./L.U.B., Mr. Saunders said:

> "The list of permitted uses for the various commercial zone designations the topic of lounges, beverage rooms, tavern uses of that order were discussed in great detail...the committee...did not want to include taverns, lounges, beverage rooms as uses permitted within the zone designation...I looked at the point of view or saw it from the point of view that there would eventually be a request from someone who would wish to have the Land Use By-law amended to allow for such uses."

Mr. Saunders feels the request is a legitimate business activity. He feels the **Planning Act** envisages a place for everything and everything in its place. He feels that the lounge is a use that is of a commercial nature and:

> "it was my opinion that within the C-1 Zone that such a use be compatible given the surrounding nature of commercial development within the zone designation...".

Mr. Saunders could not persuade Council either at the P.A.C. or at the public hearing to agree with his point of view. At the public hearing, the majority of the seventy persons in attendance were against "lounge" in the list of permitted uses. So were the majority of Council.

Mr. Saunders said that the proposed amendment is in order and quite permissible.

Mr. Saunders satisfied the Board he was an expert planner entitled to give opinion evidence on planning matters affecting the Municipality.

Mr. Saunders conceded that the liquor issue is a very sensitive issue in this Municipality.

Mr. Saunders agrees that the M.P.S.'s intent allows this particular type of amendment. Mr. Saunders had recommended the amendment to the L.U.B. as advertised.

Mr. Saunders said the general theme of the public's objections expressed was "liquor and the sale of liquor was not desirable...the consumption of liquor was not desirable".

Mr. Saunders said there was a public demand that a vote be done now, and in public.

> "Question: Did you detect any degree of intimidation?
> Saunders: Yes, I would have to say yes."

And further Mr. Saunders said:

> "I guess what I am trying to say is that there was very little objection from the public that were in attendance in the terms of land use issues that were involved it was basically in the matter of the consumption of alcohol on the premises or what happens after the effect of leaving".
>
> Q. Mr. Saunders in your professional opinion, as a municipal planner, can the decision made to refuse the amendment made by this Council reasonably be said to carry out the intent of the Municipal Planning Strategy.
>
> A. "No."

On re-examination, Mr. Saunders very clearly pointed out that when Council passed the M.P.S., it deliberately excluded lounges and taverns. He conceded that that was an intent of the M.P.S./L.U.B. at the time.

The next witness was Kent Blades, the Deputy Warden of the Municipality of Barrington. Mr. Blades is a newspaper editor and publisher. He was on the P.A.C. from 1982 to 1985 when the M.P.S. was being drafted. He therefore involved himself in the preparation of the existing M.P.S./L.U.B.

Mr. Blades said it was deliberate there was no provision for "lounge" or "tavern" in the original L.U.B.. Mr. Blades said:

> "My recollection is that it was discussed quite lengthily and the decision was made, the general concensus was that it should [not] be included in the list of permitted uses in the C-1 Zone."

Deputy Warden Blades said there was no large turnout for public information meetings held throughout the Municipality leading up to the M.P.S.

Deputy Warden Blades said the planner, at the P.A.C. meeting preceeding the public hearing, fully explained his report. He said the vote at that P.A.C. meeting to pass the matter on to Council for a public hearing was 3 for 3 against. The Chairman broke the tie to pass it along to Council.

At the Council's public hearing, Deputy Warden Blades agreed that almost everybody at that meeting opposed amending the L.U.B.

At the Council meeting setting up the public hearing, Council voted in favour of sending the amendment to a public hearing. Deputy Warden Blades said, in his opinion, the Municipality would not benefit from a lounge establishing itself in this area.

Deputy Warden Blades said:

> "I am in touch with my constituents who largely say they are not in favour of a lounge in the Municipality

of Barrington."

Deputy Warden Blades didn't feel personally intimidated by the public actions at the hearing. He didn't feel that any of the other Councillors felt intimidated.

Deputy Warden Blades felt the vote in Council was 5 to 2 in favour of sending the matter to a public hearing. He felt the vote was 5 to 2 to pass the motion to deny the rezoning.

Deputy Warden Blades stated that there are, of course, no lounges or taverns established in the area. He said there had been other Liquor Board applications dealing with a licensed eating establishment. Any applications like this, under the **Liquor Control Act**, had commanded a rather high citizen/Board turnout. He recalls the Barrington High School filled to capacity on at least one liquor license application.

Deputy Warden Blades distinguishes, in his own mind, between restaurants where the prime purpose is to have a meal and perhaps some alcoholic beverage as an addition and lounges or taverns which are primarily drinking establishments. Deputy Warden Blades felt that the M.P.S./L.U.B., as approved by the Minister, clearly set out the intent of the public. The public did not want to have taverns and lounges in the Municipality. Deputy Warden Blades says he does not drink alcoholic beverages. He feels it is quite fair to say that he is "very anti-dispensing" of liquor anywhere in the Municipality.

Deputy Warden Blades has this to say on how he made his decision:

> "I wouldn't say that, I would say that if we had gone through this process and we had come to the final stages we had, instead of having 60 or 70 people opposed to such an inclusion on the list of permitted uses - instead if there were 70 or 80 that were in favour, I would have to very much have to take into consideration as a Municipal Councillor".

On cross-examination, counsel pressed Deputy Warden Blades concerning his anti-liquor dispensing position:

> "I think it is quite well known that there are people, and I know those people, who would oppose such a thing. I made my opposition known at the Planning Advisory Committee meeting. It was no secret there. I made my opposition known to Council. I was in a debate with a Councillor who was in favour - it gained some coverage in one of the local papers. My opposition was known and I am not going to back down from that. As strongly as someone may be in favour of it tonight, who may speak in favour of it, I am opposed".

Deputy Warden Blades feels that the economic development objectives stated in the M.P.S. are general principles:

> "As you can see their motherhood and apple pie type statements. They are very general and are not specific at all".

Deputy Warden Blades anticipated that if the Board ordered the L.U.B. amendment, the Appellant would apply to the Liquor License Board for a lounge license. He anticipated there would still be a tremendous community reaction against the granting of the license. The public would protest the granting of the license at any hearings held by the Liquor License Board.

About the results of the public hearing by Council, Deputy Warden Blades said this:

> "If I was to read into what was happening here, the public were expecting a show of hands that night and they would know the results of that decision at our last Council meeting and that would hopefully be it. I mean that would be the end of the issue. The people had spoken and that was it."

Councillor Annie Reynolds testified next. Mrs. Reynolds has been a member of the Barrington Municipal Council for 13 years. Councillor Reynolds confirms that at the time the Council passed the M.P.S./L.U.B., Council consciously excluded lounges and taverns. She says they excluded them for the following reasons:

> "Well I feel that since we didn't include them in the permitted uses, we feel they were not wanted here by the people in the Municipality and I think we have to respect that a little bit. The people do not want them - that is what they are saying anyway".

Councillor Etheren Goreham was the next witness. He has been a member of Council since the last election only.

Councillor Goreham said he supported at P.A.C. sending the matter to the full Council so Council could sent the application to a public hearing. He also recalled the vote at the public hearing being five for the motion and 2 against.

This was the refusal decision the Appellant appealed.

Councillor Goreham thinks that the M.P.S. is necessary:

> "Well to see this Municipality receive some sort of planning and direction that is necessary for an orderly development of the Municipality".

Warden Cecil Edward O'Donnell was the next witness. He has been a Councillor for three years before his present term and a Warden starting this term.

Warden O'Donnell said he was perfectly familiar with the present application being made by the Applicant. Warden O'Donnell explained his vote against the rezoning as follows:

> "I think my vote was based on what I feel is good for that area. I think I have a responsibility to the people from my area which I listened to at this public meeting and I made my decision".

Warden O'Donnell was the last witness called by either party.

Since it was early afternoon, the Board then heard one of the citizens, Lloyd Whabley, a retired bank manager, speaking on behalf of St. James United Church.

Mr. Whabley said his Church was close to the proposed lounge. He said the congregation of that Church opposes the L.U.B. change which would permit the lounge in the Church's neighbourhood. He stated the congregation's concerns. They extend to the devaluation of the Church property and the bad effect the lounge might have on the whole community.

On the other hand, he said, if a lounge opened in the area, it would likely be well patronized. If it were, there would be much more traffic in the alleys and parking lots. He said the immediate presence of the lounge would promote vandalism of the Church property by lounge customers.

Mr. Whabley said:

> "In our area there is very rigid conservative attitudes towards drinking founded in the religious community. Larger contres have lounges within the community, however, they are not surrounded by a community with a conservative religious component as large as ours."

The first citizen witness at the evening session was Ronald McGiven. He is a commissionaire employed at C.F.B. Barrington. He has lived in the area since 1982. He supported the Victoria lounge. He would like to have a lounge to visit. He would visit a local lounge when his family came from away. It would be a nice place "to go out to".

W. Maxwell Nickerson of Port La Tour, retired, said he opposed any change in Council's decision. He said he was speaking on behalf of his Church since his minister was away on holidays.

Mr. Nickerson feels there are a lot of young people working in Barrington Passage. He feels, from a moral standpoint, a lounge would not be in their best interests.

Mr. Nickerson is a former Councillor of the area and a former member of the Welfare Board. As such, he has seen the problems liquor engenders. In his experience the more liquor available the worse the problems become.

Mr. Nickerson belongs to the Port La Tour United Baptist Church.

Elaine Schneider, a part-time teacher, "could safely predict" the Appellant would run the lounge in a safe and dignified manner. She said it is not a tavern or a bar. She knows the owners. She feels they won't serve those individuals who are acting up through over-indulgence of alcohol.

Kelly Nickerson of Barrington was a food service worker and is twenty-two years old. She said she goes to the Oxbow

Motel in Shelburne when she wishes lounge equivalent entertainment. She said the distance to the Oxbow is such that drinking and driving become a problem. She feels a lounge in a local area would be good for the young people of the area. A lounge would help reduce the high incidence of drinking and driving. She feels that a lounge in the area might help support a taxi service and again lower the drinking and driving.

Ms. Nickerson noted that the Canadian Forces Base will be closing soon. She will be looking for work. She has the qualifications to work at this lounge. The building and staffing of the lounge will create a good economic impact on the community.

Edward Allen, a Social Worker in the Children's Aid Society, lives in Centreville. He said that the granting of the L.U.B. amendment, as requested, will be one step closer to getting more local liquor licenses. He said the property has limited parking. He said when the license was granted for the dining room back in the past the same arguments were used. At that time the appellant stated it would not be seeking more extended licenses.

Mr. Allen said there were moral issues involved and a concerned Christian should take them into consideration. As a child welfare worker, he said the incidence of child abuse is increasing. He said the abuse of alcohol was a contributing factor to that.

Mr. Allen believes that the tourist appeal of lounges is unfounded. The historical significance of the area satisfies the tourists. He said the Victoria Motel is very centrally located in the area. Any detrimental effects caused by it adding a lounge would affect the entire area.

Mr. Allen said Municipal Council listened to the residents, and rightly so. He said that the "Appeal Board" knows nothing about the local area. It has no business whatsoever interfering with Council's decision.

John Leech, a fisherman, said that Mr. Hewitt does not propose to open his lounge establishment until the evening hours. Then the other businesses surrounding him close. He said the job opportunities were getting much worse in the area with the Federal base closing. He says the lounge will create work. He said he saw the plans and he feels the parking is sufficient. He says the abuse of alcohol is all around us in any event. People will drink wherever they are. If they drink in supervised surroundings as proposed for this lounge, alcohol abuse will be minimal.

Mr. Leech understands the lounge will be providing a free bus service should somebody over-indulge in alcohol.

Mr. Leech recommended there should be a lounge in the area.

Blair Brown of Barrington Passage is a Councillor for District No. 3. His house is near the boundary of the C.B.D. He has no concern that anyone will build a lounge. He feels that there are safeguards built in to prevent this. He opposes the lounge.

Mr. Brown is a newly elected Councillor. He quoted from a Book provided by the Department of Municipal Affairs, "A Guide to Local Government in Nova Scotia". He pointed out that the Board cannot interfere with Council's decision. He said that important issues such as this Council should pass back to the community for a plebiscite. Again, he said, that this plebiscite idea was clearly in the book.

Donald Smith a retired armed forces person said that he lives in the area and said he is a born-again Christian.

Mr. Smith objects to the lounge. He said alcohol is a danger to people on the highways. He said the lounge's provision of a taxi or bus service is an admission of guilt. He said it will be taking drunk people home to their families and young children.

Mr. Smith said he has heard talk of the tourist benefit in the area from a lounge. He has not seen anybody translate the talk into specifics of the increase in tourist days. No one has shown him the net dollar effect of any tourism increase. He suspects the net dollar value will be very little. He said there will be an increased need for police protection and court costs. All these costs accrue to the taxpayer. He feels there will be no benefits to outweigh the costs.

Mr. Smith said that it is not true that people need alcohol to dance. Television promoted the idea that people cannot have fun unless you are drunk or drinking. He said people must support higher standards.

Mr. Smith said change in the community is going too fast. He said the community is weak and that the parents have double standards. They tell their kids not to drink and they drink themselves.

Mr. Smith said he is not willing to allow this general deterioration in society to occur without a fight.

Mr. Smith feels that a lounge, if approved, is just a stepping stone in the general descent of society. The next move somebody will want to open a strip joint. Where, he asks, can the matter end?

Mr. Smith said he has been all over the world. He sensed a general depreciation of the moral tone of communities.

Mr. Smith said the Victoria Motel as it now exists is a traffic hazard. It is in a bottleneck. The extra traffic generated by a lounge will make it much more difficult to take ambulances back and forth to the hospital. He said he is an ambulance driver. Even now he finds it troublesome to get through the congestion near the hotel to take people to the hospital.

Mr. Smith said that the abuse of alcohol is contrary to the laws of God. He said God had no intention of revising those laws. He said we are not helping people when we abuse God's laws and make available more temptations for persons. Mr. Smith said there will be a judgment day. He said that to support this particular proposal is to be against God.

S. Gotlieb, a New York City law student, was a guest at the motel. As a tourist, he asked the question:

"Is alcohol legal?"

As it is legal to consume alcohol, he wonders why he must to drive 25 miles to enter a lounge environment. Mr. Gotlieb did not come here to go out and "booze it up". He said he wanted to be able to surf and to enjoy the scenery. He feels that he should be able to attend a lounge here.

Mr. Gotlieb feels that a lounge engenders a good social atmosphere. He should have a right to enjoy this social atmosphere. Mr. Gotlieb feels a business person should be able to attend a lounge and be able to drink alcohol there. Questioned by the Board, he said that perhaps a proper solution might be to have a referendum in the community.

Roger Nickerson is a landlord of residential property in Barrington Passage within 500 feet of the Victoria Hotel. He said he had a police problem in the area. R.C.M.P. took six hours to respond to his call. He wondered if police problems originated at the lounge, would the R.C.M.P. respond at the same speed.

Barry Drake of Clearwater said the hotel's Friday lounge-like operation helped him when he moved into the Municipality. He goes to the hotel on Friday nights. He has a good meal and a few drinks he enjoys the entertainment provided Fridays at the hotel.

Everyone Mr. Drake knows drinks. That does not mean that everyone he knows is a hazard on the highway.

Mr. Drake said his personal highway risk factor may go up, not because he is drunk, but because he has danced all night, is tired, and still has to drive 50 minutes back home.

Mr. Drake feels a shuttle bus service from the lounge would be of assistance. He feels that tourists would like to stop at the lounge. Mr. Drake concedes that the community, in general, is a very religious community. Mr. Drake feels there is a great deal of opposition to the lounge in the community.

Support for the lounge at the Board hearing surprised Kenneth Smith, a Councillor. At the public hearing the owners stood alone.

Councillor Smith voted against the amendment. He has not changed his mind. Ninety-nine percent of the public opinion, in his opinion, is against the lounge. He still thinks the decision (regardless of the views expressed that night) is in keeping with the intent of the M.P.S. If a change to permit a lounge is necessary, he feels it requires a change in the M.P.S.

Councillor Smith said the Board should uphold the decision of Council.

Lorraine Pierce owns a printing company. She supports the proposed lounge. She knows the owners. She knows they will permit no trouble on the site. She did not know the public hearing of Council was available to her and, consequently, did not attend it.

Douglas Hankinson, retired, lives in the disputed zone.

He supports the lounge concept. He has eaten at the hotel many Friday nights. He does not have to drink to go there. He said he owned the hotel for twenty-five years when the premises were totally unlicensed. He said he had to patronize bootleggers in order for him to satisfy his customers, even then. He said he suffered some degree of economic hardship because he had not even a restaurant license.

Lucy Nickerson of Cape Sable Island works as a housekeeper. She has to deal with a lot of tourists. Her family enjoys going out for a drink and a dance. She feels a lounge would provide work in the community.

Wilfred Grady, an educator, says he respects the local people. It does not matter much to him, one way or the other, whether there is a lounge. He lives in a secluded area. He said many young people go up there. None of them have ever thrown beer cans or littered his property. He feels that young people would behave as well had they access to a lounge.

Sherry Blenkhorn, a member of the Pentacostal Church, does not agree with a lounge for herself. She has friends that drink and drive. She feels that a lounge won't influence people to drink. She does not oppose the lounge. If her friends drink at the hotel, and over-indulge, they can be escorted home. This is better than driving home, after drinking, from the Oxbow.

Ms. Blenkhorn gave the impression that she would be able to govern her own morals in relation to alcohol. She did not intend to impose her own moral standards on her friends.

Mr. Crowell of Shag Harbour opposed any change. He understood those in favour of the lounge admit there is a problem with liquor and people driving drunk. If the majority in your own community wish a lounge, it is your right to have it. He opposes the lounge here. He believes the majority of the community opposes any lounge.

Burton Sears of Woods Harbour stands opposed to the lounge. He said he spent his early days in abuse of alcohol. Liquor got "ahold" of him. He became an alcoholic but he "has been saved" over thirty-two years ago. Mr. Sears is not saying that everyone who drinks will ever have problems. One never knows. He suggested the young people be extremely careful.

Reverend Richard Fowler has just moved to the Barrington area from Maine. He is the pastor of a Baptist Church. He knows a bit about liquor. He is a former U.S. Marine. In the Marines he had witnessed alcohol abuse. He has seen many families ruined by the abuse of alcohol. He has chosen to live in Canada. He said the elected officials have made a decision reflecting the wishes of the community. The Board should leave that decision alone.

S. Nickerson is a retired fisherman and has seen a lot of alcohol abuse. He has never seen any good from alcohol. He has been aware of many people who drowned, drunk. He said alcohol abuse a year ago at Woods Harbour took a man's life. He said not everybody can take or leave alcohol. Those that can't, deserve support.

Mr. Nickerson supports Council's decision.

Ernest Hewitt works for the Victoria Motel. A lot of fears about the hotel are unfounded. Mr. Hewitt is not advocating drunkenness. His wife works very hard making the hotel work. Taxi service would be useful. He feels unqualified to speak on the moral issue. The lounge benefits the Hewitts economically. There is abuse of alcohol wherever one goes. The Hewitts have two small children. They are raising them in a Christian family. That is not the issue.

Mr. Hewitt feels the lounge will definitely be beneficial to the community.

Douglas Pike, a Federal public servant, does not believe Council's decision was right. He has appeared before Council. Council should have made sure more of the public knew of the hearing.

Dorothy Goreham upholds the Council's decision. You do not need liquor to enjoy yourself. Alcohol can be very destructive.

Edward Nickerson is a housing administrator from St. Anne's. Mr. Nickerson was on the P.A.C. which initiated the M.P.S./L.U.B. Mr. Nickerson opposed including lounges in the L.U.B. at that time.

Trudy Kenney works at Fisheries. She feels that if you wish to drink, you will go as far as necessary to get the drink.

Maureen Nickerson works at the Victoria Hotel. She said she was a bootlegger's daughter. She knows a lot of mistakes have been caused by alcohol. She supports the lounge.

Shirley Ann Larkin is a cafeteria worker. She supports Council's decision. She strongly opposes all alcohol. She does not like to think about all the bad effects it would cause. The lounge would have a bad effect on everyone.

Paula Nickerson, a waitress at the Victoria Hotel, is in favour of the lounge. She often goes to the Oxbow. She does not drink that much. She goes there for the dancing. .08% is not very high an alcohol level. There is a long drive home from the Oxbow. With the lounge, she could avoid the risk of drinking and driving.

J. Larkin is a fisherman and onetime seafarer. He felt that the economics of the lounge would only be good for business. It would be good for these parties, the one who makes it, and the one who sells it. The ones who handle it. After that it is a real loss. He supports Council's refusal decision.

S. Gognan of Canada Fisheries thinks nothing is wrong with a lounge. She likes to go out and have a drink and dance. She does not see anything wrong with it. She and her husband now have to drive up to Yarmouth for the entertainment they want. Sometimes they have to stay longer than they want because one or the other has taken more liquor than he should. She thinks a shuttle bus would be helpful in this local area.

M. Nickerson of Marine Atlantic strongly opposes a lounge. He has never seen any good come from liquor.

C. Smith a fisherman of Port La Tour felt sad so many young people favoured the lounge. He said he almost got "hooked" by liquor but was saved by the Lord.

L. Maxwell is pro-lounge. She said that everybody has a free choice to go out and have a drink at a lounge or to stay at home. She said there is nothing "around here" for entertainment not even a theatre.

A. Smith, a Sable Island fisherman, strongly opposes the lounge.

Leilan Strang of Clyde River, truck driver, is in favour of a lounge. He said his employment demands careful attention to the license every day he has to go to work. He appreciates a place he can drink in with a service to take him home. If he over-indulged in liquor he would not be putting his license at risk.

B. Hopkins is against the lounge in the Victoria Motel.

A. Nickerson says she is ashamed of the people of Barrington. You can get free food at the Jewish Kingdom and feel loved when you go there. She strongly opposes the lounge. Her brother was a policeman in Halifax. She has heard many bad stories in relation to liquor.

Ms. Nickerson was the last witness to testify that evening.

The Board concludes, having heard all this evidence, that at the public hearing held by Council on the rezoning there was much apparent public opposition. No apparent public support for the rezoning appeared at Council's hearing.

At the public hearing portion of the Board session there was not that much difference in numbers between expressed support for the L.U.B. amendment and expressed support for Council's refusal decision. There is clearly a mixture of pro-lounge and anti-lounge people in the community.

The Board has made a detailed summary of the evidence because of the interest expressed in this community on this issue.

The Board sees little difference in the factual positions between the proponents of the lounge (the Appellant) and the Respondent Municipality.

Facts that appear not in dispute and relevant to this issue, are, in the opinion of the Board, as follows:

1. That there is no lounge in the area.
2. There is only one hotel/motel in the area in the C.B.D.;
3. That it would likely have been politically impossible to have had the L.U.B. passed with the "lounge" included originally. Council would not have passed the M.P.S. Council would not have passed the L.U.B. If Council did not pass the M.P.S./L.U.B., they never would have been available for Ministerial approval. (That was the next necessary step to have the M.P.S. and L.U.B. take effect as law.) It is clear therefore that this was a thought-out and

determined point. It is therefore clear that the intent was not to include lounges at the time of the passage of the M.P.S./L.U.B.

4. It is not so clear whether Council distinguished between free-standing lounges in the form of "roadhouses" as opposed to a lounge as an accessory to a hotel/motel.

5. The immediate intention of the proposed change to the L.U.B. would allow the first two phases of the particular proposal of the Victoria Lounge to proceed.

6. It is also equally clear that there was an amendment provision put in the M.P.S./L.U.B. Council can make amendments to the L.U.B. both boundary changes and generic changes. The Appellant seeks a generic change here.

7. It is clear that the original M.P.S. included not only uses that existed on the ground in the C.B.D. at the time. It also contained certain other uses that were not in existence on the ground as well. These proposed uses the Council of the day thought it might usefully encourage to locate in the downtown area in the C.B.D.

8. "Lounge" was clearly not among those proposed uses being encouraged in that area at that time.

9. It is clear to the Board that there is (as phrased by Mr. Whabley) a "large conservative religious

element" in the community which opposed this lounge vociferously at the Council level. This element opposed the L.U.B. amendment at the Board level. It is prepared to oppose lounges again at the Liquor License Board level should that become necessary.

This portion of the community deals with the possible existence of this lounge as a moral issue worthy of its attention. Thus this portion of the community considers worthy political action to support its views on this "lounge" issue. It therefore puts pressure on the elected community officials. It considers worthy pressure on any other officials who may have to do with the granting or refusal of additional liquor outlets in the area.

There is a demand for a lounge in the area. The Appellant proposes to include an additional 200 seats in its lounge. Its witnesses have testified (and nobody has contradicted the fact) that the financing is available to accomplish this.

The evidence, again, of demand for a lounge, is uncontradicted. In the context of this community, the proposed lounge is a viable economic project. It would have some degree of impact on the local employment level and the local tourism business. The activity would concentrate in the C.B.D.

With these facts in mind, the Board then is able to narrow down the issues. It now states what it feels are the major arguments of the parties.

Mr. Nickerson's argument on behalf of the Appellant is two-phased:

1) This appeal may not be necessary at all since "lounge" use a proposed is an accessory use to the hotel/motel use. "Lounge" already exists under the accessory use provisions of the L.U.B.

His alternative argument is that the lounge as proposed for an accessory use is clearly a commercial enterprise. The C.B.D. needs this commercial use. It will establish support of local employment, local assessment and encouragement for the tourism business. It will improve the standard of life of the citizens in the community. As such, he says the proposal is within the intent of the M.P.S.

2. Council made its contrary decision on improper grounds: (viz the Notice of Appeal):

a) that the Council failed to consider the application on its merits.

b) that the Council failed to adequately consider the recommendations of its planning advisory committee.

c) that the Council's decision was contrary to the stated goals and objectives and Municipal Planning Strategy.

d) that Council were wrongfully influenced by a number of members of a religious denomination most of whom had made objection which bore no relevance to the question at hand.

e) that the Council failed to give proper consideration to the recommendation of the planner and staff.

Mr. Pink, for the Respondent Municipality, conceded that the proposal was within the intent of the M.P.S. He concluded Council could have inserted this economic use in the C.B.D. Zone had Council wished to make the amendment. He argued the initial intent of the M.P.S./L.U.B. was clear. "Lounge" as a use did not appear in the C.B.D. Zone. After full and frank discussion, a decision of Council excluded "lounge" from the L.U.B. The Minister approved that decision. That intent, Mr. Pink said, was clear.

When Council, in its wisdom, decided to make an amendment to support "lounge" use, that was when "lounge" use would be established. Council had full discretion when it would amend the L.U.B.

Council had decided this application. It first heard all the views of the planner in favour, the P.A.C. in favour and the Appellant in favour. It heard the views of the religious element in the community against. Having had all these representations before it, Council decided the amendment to allow "lounge" use was not yet appropriate. Mr. Pink contended that the decision of Council, having heard all views, was also within the intent of the M.P.S.

In such circumstances, Mr. Pink argued that the Board must follow the provisions of the **Planning Act** and dismiss the appeal.

The **Planning Act** sections that apply to this particular aspect of the appeal are as follows:

Section 63(3) says:

> "The Board shall determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy."

Section 63(4) says:

> "The Board may
>
> a) confirm the decision of Council;
>
> b) allow the appeal by reversing the decision of Council amending or revising the Land Use By-law; or
>
> c) allow the appeal by instructing the Council to amend the By-law in a manner prescribed by the Board."

Section 63(5) says:

> "The Board shall not allow the appeal unless the Board reasonably determines that the decision of Council cannot reasonably be said to carry out the intent of the M.P.S."

Section 63(7) says:

> "Notwithstanding subsections (5) and (6) the Board may allow an appeal by an Applicant if, in the opinion of the Board:
>
> a) the Applicant would suffer undue hardship or
>
> b) extraordinary and compelling circumstances are present."

These are the specific subsections which deal with the [especially subsection (3), (5) and (7)] specific issues the Board has to determine in this appeal.

Section 63(7) does not assist the Appellant in his appeal.

In this particular case, because of the various community interests involved and the various arguments made, it may be useful to go back to the **Planning Act.** The Board looks at the stated purpose of the Act.

Section 2 spells out the purpose of the Act. Purposes that are particularly applicable in this appeal are found in 2(a), 2(b), 2(c) and 2(d):

> "The purpose of this Act is to
>
> ...
>
> (b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character through the adoption of municipal planning strategies, land use by-laws and subdivision by-laws consistent with the policies and regulations of the Province.
>
> (c) Establish a consultative process which will ensure the right of the public to have access to information and participation in the formal policy, regulation, strategies and by-laws including the right to be notified and heard before decisions are made under this Act.
>
> (d) Provide for the fair, reasonable and efficient administration of this Act in order that sound development may be encouraged."

Section 34(2) states as follows:

> "The content of a public participation program shall be at the discretion of the Council but it shall identify opportunities and establish ways and means of seeking the opinions of the public with respect to the proposed municipal planning strategy."

Council in this case made provision in the passage of the original M.P.S./L.U.B. to receive what it perceived to be the views of the public in relation to the provisions of the M.P.S.

In view of the goals mentioned above, the M.P.S. has a purpose and a content. That purpose is spelled out in Section 37 of the **Planning Act**:

> "It shall be the purpose of the Municipal Planning Strategy to provide statements of policy for the management of the Municipality and to further this purpose to
>
> ...
>
> b) establish and specify programs and actions necessary for the implementation of the Planning Strategy."

Section 38 of the **Planning Act** contains what must be in a policy.

Section 38(2) contains what may be in a policy or Municipal Planning Strategy.

Section 38:

> "1) A Municipal Planning Strategy...shall include any policies necessary to carry out the intent of the applicable Provincial Land Use policies.
>
> 2) A Municipal Planning Strategy... may include statements of policy with respect to any or all of the following:
>
> a) the goals and objectives of the Municipality for its future;
>
> b) the improvement of the physical and social environment of the municipality;
>
> ...
>
> e) the use or change in use or intensity of use of activities in or affecting land including... commercial...uses;
>
> g) requirements for the staging of development;
>
> h) the provision of municipal services...including...

> iv) the provision of an adequate and efficient transportation network and related systems...
>
> i) educational, cultural and health facilities;
>
> ...
>
> r) any other matter relating to the physical, social or economic environment of the municipality."

An M.P.S. cannot be imposed without a L.U.B. (Section 51(1)):

> "Where a planning strategy...contains statements of policy with respect to the control of land use and development, the council shall concurrently with the adoption...of the planning strategy adopt...a land use by-law to implement the planning strategy...
>
> (2) A council shall not adopt...a land use by-law except to carry out the intent of a municipal planning strategy."

What this land use by-law may contain is set out in Section 53(3):

> "The by-law may...
>
> b) regulate or prohibit the use of land except for such purposes as may be set out in the by-law...".

These are the requirements that the Minister and Council must have had regard to in the composition of the M.P.S. and L.U.B. that are in effect. The Board has no control over the content of these documents and has no power to review their passage and approval. The Board therefore must consider the intent of the M.P.S., approved by the Minister, that is put before it.

In order to help to determine the intent of the M.P.S. the Board may also specifically refer to the L.U.B. that passed with it.

Re Laba, (1988) 38 M.P.L.R. p. 170, Pace, J.A.'s decision, has remarkable similarities to the case here. It supports the importation of the L.U.B. into the M.P.S. in order to interpret the intent of the M.P.S. At page 173 Mr. Justice Pace took the following position as to the facts:

> "Certain policies were adopted by the Town to carry out the Municipal Planning Strategy among which were Policy K4 which states in part as follows:
>
> Policy K4 in addition to all other criteria for zoning amendments has set out in the various policies of the Plan Council shall ensure:
>
> a) that the proposal is in conformance with the intents of this plan and with the requirements of the other town By-laws and regulations...
>
> b) that the proposal is not premature or inappropriate by reason of...
>
> iii) the adequacy of road networks adjacent to or leading to the development".

Perhaps one could contrast this with the present M.P.S. before us for consideration. One finds in H(6) criteria for amendment to the L.U.B.:

> "In considering amendments to the Land Use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:
>
> a) That the policy is in conformance with the intentions of the strategy and with the requirements of other municipal by-laws and regulations;
>
> b) That the proposal is not premature or inappropriate by reason of...".

In the view of the Board, these provisions of two separate M.P.S.'s are virtually (the one in Laba and the one in the present case) the same. The Board therefore wishes to go forward and refer to Laba at the same page, Mr. Justice Pace's had this to say about the Board's activities:

> "The Board after considering all the evidence before it concluded "the Board refers to Policy K4(a) of the M.P.S. which incorporates inter alia regulation 11(b) of the subdivision regulations into the M.P.S....such incorporation...".

In the view of the Board, Laba supports Mr. Pink's contention (also supported by the Board's view of the facts in this appeal) that an intent, an original intent of the M.P.S./L.U.B., was clearly not to allow lounges in the C.B.D.

Again, without argument, one may see this by looking at the listing for the uses in the Central Business District (C-1) Zone, C-1 Permitted Uses:

> "The following uses shall be permitted in the Central Business District (C-1) Zone [where it is noted that hotels and motels are permitted and restaurants are permitted but there is no specific reference to lounge]."

In this context "lounge" was not considered as an accessory use to Hotels/Motels by the drafters and passers of the M.P.S./L.U.B. They did not intend to include "lounge" as an accessory use anymore than as a freestanding use.

Appellant's counsel argued that "lounge" was an accessory use to hotel/motel. The Board finds, within the intent of this particular M.P.S./L.U.B., "lounge" is not an accessory use to hotel/motel. Lounges did not exist in the community at the time. Council considered lounges. Council rejected lounges specifically. The Board finds this as fact. The evidence tendered by both sides supports this finding. Therefore the intent of these documents, as written, did not include "lounge" as an accessory use to hotel/motel in the original M.P.S./L.U.B.

The **Planning Act** contemplates amendments to the L.U.B.

The M.P.S. contemplates amendments to the L.U.B. It contemplates the type of generic amendment proposed here.

Given the finding of the Board that "lounge" is not an accessory use to hotel/motel, the dispute now resolves around whether the intent of the M.P.S. allowing generic amendments to the L.U.B. such as this one require Council to pass the proposed amendment at this time.

All parties before the Board conceded that Council could have passed the amendment had it so wished.

Since Council chose not to pass this amendment, the Board must resolve whether it can allow the Appellant's appeal. Can the Board order the Council to pass the amendment as sought?

The planner's stated opinion is that Council's refusal decision is not within the intent of the M.P.S.

Mr. Saunders justified this opinion basically on the theory that the amendment process was contemplated by the M.P.S. He said there was no lounge in being for Council to deal with at the time of the passage of the M.P.S./L.U.B. It was not essential Council include "lounge" use in the M.P.S./L.U.B. at that time. Mr. Saunders felt that the demand for "lounge" use would arise. Council would deal with it at the time economic demand for "lounge" occurred.

The M.P.S./L.U.B. contemplated just the present contingency.

Mr. Saunders felt that "lounge" use was a legitimate and proper, from a planning perspective, ancilliary or accessory use to the hotel/motel. In his opinion the proposed lounge would support economic development in the community. It would support employment in the community. It would perform a useful support for the tourism industry. He found support for all these propositions in the M.P.S. No one contradicted him.

Mr. Saunders said that it was not for him, as a planner, to assess the impact on Council's refusal decision of the expressed religious and moral views from many of the citizens of the community.

It is clear to the Board that the Council of the day approving the original M.P.S./L.U.B. excluding "lounge" use paid a great deal of consideration to its own moral views. It paid attention to the views of the religious community in the Municipality. The views of this section of the community were therefore embodied into the decision of the M.P.S./L.U.B. that now exist before this application to change the L.U.B.

The Board cannot review those decisions made by the Council/Minister of the day. Those decisions are not under review here. Those decisions made the intent of the M.P.S. as it now exists.

The question of whether or not the religious and moral views of a large segment of the community ought to be applied to an M.P.S./L.U.B. are of only hypothetical interest to this Board. When the decision concerns a Ministerally-approved Council-approved M.P.S./L.U.B., this Board has no say. In terms of the **Planning Act**, this Board cannot do that review.

The imposition of the same forces of religious and moral outlook of a large segment of the community is no longer a hypothetical question when it is put to the Board in the context of a L.U.B. amendment.

The Board must determine whether Council's refusal decision is reasonably within the intent of the M.P.S.

It should go without saying that the M.P.S. must be within the intent of the **Planning Act**. The L.U.B. must be within the intent of the M.P.S. These three documents are the structure the Board must study to determine the intent of the M.P.S. The foundation of the **Planning Act** supports the first storey of the M.P.S. which supports the second storey of the L.U.B. The L.U.B. amendment cannot exist without the support of these two lower portions of the planning structure.

In this particular case, the Planner and the P.A.C. have both supported a change in the L.U.B.

The Board feels that Council's decision followed the wishes of large groups in the community. These groups objected to this particular lounge application based on moral-religious grounds in which the groups opposed sincerely believed.

The moral/religious objections to the consumption of alcoholic beverages by humans have, as well, arguable social grounds. These social grounds rest on the possible detrimental effects of alcoholic beverages on humans who consume them.

Section 38(2) of the **Planning Act** allows the M.P.S. to set policy designed to improve the social environment of the **Municipality.** Section 38(2)(r) "any other matter relating to the social environment" may cover policy so the Municipality can regulate the dispensing of alcoholic beverages by zoning.

Beverage alcohol is a drug which, when ingested by humans, can impair their functions temporarily. In certain conditions, it can do so for a more extended time.

(The beverage alcohol drug's limited medicinal function is not germane to the present appeal's deliberations.)

The use of beverage alcohol drug can lead humans to become addicted to it. Beverage alcohol use is widespread in our society.

Human abuse of the drug, beverage alcohol, is widespread.

In controlled circumstances, beverage alcohol is not illegal.

In our recent history, our society attempted to prevent the social use of beverage alcohol by absolute prohibition of its non-medicinal use. The demand from the public for beverage alcohol for social use became so extensive under prohibition, that prohibition was rescinded.

The **Liquor Control Act** R.S.N.S. 1967, c. 169, represents government's attempt to balance society's demand for beverage alcohol against the definite harm beverage alcohol will do to our society.

Section 162 of that Act states the purpose and intent of the Act.

> "162. The purpose and intent of this Act are to prohibit transactions in liquor...except under Government control...provide the means by which such government control shall be made effective..."

The statute goes on to create a code which governs, or tries to govern, the sale, dispensation, and consumption of the drug, beverage alcohol, [which it calls "liquor"] within the Province.

The application of this code to this Municipality has, to date, permitted inhabitants of the Municipality to consume, legally, beverage alcohol. At restaurants, the public now, within the Municipality, may buy and consume certain beverage alcohols in public places. These same inhabitants may travel to adjacent municipalities. There they legally may consume beverage alcohol, in public, in lounges licensed under the **Liquor Control Act**.

If one wishes to obtain a lounge license, one must first satisfy the **Liquor Act** authorities that municipal zoning permits a lounge.

Thus this application for a "lounge" amendment to the

Municipality's L.U.B. is the first, and necessary, step in the Appellant's desire to provide "lounge" services on its land.

The objectors to this proposal, mostly persons who are objecting on moral/religious grounds, seek to restrain further extension of facilities to sell the drug, beverage alcohol, in their community.

Proponents of this "lounge" rezoning application disagree with these views of the opponents to the lounge.

All witnesses seem to agree that some persons abuse alcohol. The proponents feel the services sought are legal and will be well maintained. They feel the lounge will have a good economic impact on the community. They see a community need for the proposed services.

The Board reviews Section 2 of the **Planning Act** spelling out the purpose of the Act. The Board sees no specific support in there for the regulation of land use for the support of particular religious/moral views.

No one raised to the Board whether or not the existing M.P.S./L.U.B., found as described, and/or the decision of Council to refuse the L.U.B. amendment, violated anybody's rights to freedom of thought, belief and opinion, conscience and religion. (See Section 2(a) of the **Canadian Charter of Rights and Freedoms**). No one argued discrimination based on religion under Section 15. Since no breach of the **Charter** was alleged, and none is glaringly obvious on the record, the Board will not mention the **Charter** further.

The Board also refers to Section 38(2)(b) of the **Planning Act.** This subsection allows for the inclusion in the M.P.S. of a policy statement concerning the improvement of the social environment of the Municipality. (See Section 38(2)(r) for matters relating to the Social Environment of the Municipality). The Board refers to Section 53(3)(b) of the **Planning Act.** It provides the L.U.B. may regulate or prohibit land use. Such a L.U.B. must also, while protecting the social environment of the community, do so only on the same terms as the M.P.S. can.

It is clear to the Board that, in passing the original M.P.S./L.U.B., an intent of the M.P.S. was to honour the religious and moral views of a large portion of the community. That regulation is not reviewable by this Board.

The Board notes that the decision of Council in refusing the L.U.B. amendment was contrary to its planning advisor's expert planning advice.

The Board believes on the evidence that the Council's decision was based largely on the moral/religious views of large numbers of its constituents. Those views of the constituents are genuine, sincere and clear. They opposed this liquor establishment and liquor establishments in general in the community.

Previous Board decisions repeatedly state that Council must, when deciding L.U.B. amendments contrary to their planners' proper planning advice, do so for good planning reasons.

Some of these decisions are:

L & G Holdings Limited v. City of Halifax NSMB-14-89-P

(unreported) at page 14:

> "The opposition of some people in the neighbourhood was before Council. The expressed reasons...were not, in the view of the Board, founded in the intent of the M.P.S....
>
> Council was free to present planning evidence to the Board to show that its decision reasonably fit within the intent of the M.P.S. It chose to rely on the planning evidence adduced, consisting of the uncontradicted evidence of Mr. Reddy that the decision of Council did not fall within the intent of the M.P.S.
>
> In view of this uncontradicted opinion upon which the Board (in this case) relies..."

See Bates v. New Glasgow NSMB-4-89-P, (unreported) at page 32:

> "on the evidence the Board has formed the opinion that Council decided the application before it for other than good planning reasons."

See Tony R. Blom v. City of Halifax NSMB-31-88-P (unreported) at page 2:

> "There was no expert planning evidence contrary to...the planner."

See Dalton v. Sydney (1987) 6-B MBD 457, at page 472:

> "From the evidence in this appeal it appears that the opinion of the planners was that the proposal was within the intent of the M.P.S. and...the...refusal decision of [p. 473] Council was not."

Dalton followed Ranni v. Sydney (1987) 6-B M.B.D. 176, the headnote of which states:

> "some members of Council made their decision to refuse...not on the intent of the M.P.S. but as a result of submissions by area residents. Council may give consideration to these opinions, but must make its decision based on reasonably carrying out the intent of the M.P.S. If Council does not agree with the recommendation of planning staff, it should have some reasonable basis for doing so based on the intent of the M.P.S.".

The Board will not cite further decisions here.

As previously noted, an **implicit** intent of the M.P.S./L.U.B. was to prevent "lounge" use while allowing an amendment in the future.

The Planner said the time had come to grant such amendment. Council said "No".

The Board derives the intent of the M.P.S. from reading the entire document. Policy A-2(ii) can accommodate with amendment of the L.U.B. the commercial use of "lounge". Policy H-6 sets the criteria for L.U.B. amendment. Policy C-37(b) and (c) strongly encourage the upgrading and encouragement of tourism. Policy C-26 encourages expansion and new Commercial Use in the C.B.D.

These explicit policies, in the view of the Board, prevail over the implicit intent of the M.P.S. noted before which is "anti-lounge". Where the differing intents clash, the Board agrees with the Planner, Mr. Saunders, that the true intent of the M.P.S. supports the L.U.B. amendment. The proposed L.U.B. amendment is reasonably consistent with the intent of the M.P.S. The decision of Council is not reasonably consistent with the intent of the M.P.S..

Clearly Council, in making its decision, considered popular opinion not founded upon a true appreciation of the overall intent of the M.P.S. That popular opinion had little foundation in good planning reasons.

It is the view of the Board that such action is not supported by the **Planning Act**. It therefore cannot be supported by the M.P.S.

The consideration of Council of these religious views as their determinant in the view of the Board cannot be supported by the intent of the M.P.S. under the provisions of the social environment clause set out in the **Planning Act**.

In view of the numerous Board decisions cited above, Council, in so acting, made a decision not reasonably consistent with the intent of the M.P.S.

The Liquor Licensing Board will deal with lounge licensing Any lounge constructed will be controlled as are all lounges in Nova Scotia.

That being the case, the appeal will be allowed. Pursuant to Section 63(3) of the **Planning Act** the Board determines that the decision of Council does not reasonably carry out the intent of the M.P.S.

Pursuant to Section 63(5) of the same Act, the Board allows the appeal, because it determines that the decision of Council cannot reasonably be said to carry out the intent of the M.P.S.

Therefore, under Section 63(4)(c) of the **Planning Act**, the Board allows the Appeal. It instructs the Council to amend the By-law to allow the generic change in the C-1 Zone permitting "lounge" as an accessory use to a hotel/motel.

One other point deserves the Board's attention.

A person unrepresented at the hearing (and not appearing at the hearing) caused a communication to be made by FAX to the Board on October 4, 1989. At that time the Board had concluded taking its evidence, had the matter under consideration, but had not yet delivered its decision.

The Board notes that it notified all persons concerned of the hearing by advertisement in the press. The Board set aside a special advertised evening hearing for public convenience. The Board ordered written notification of the hearing delivered to the assessed owners of property within 500 feet of the subject site.

The FAX transmission, on behalf of an adjacent landowner, apparently was an attempt to adduce [not legal argument prior to the decision] factual information to the Board after the time for adducing evidence had closed.

The Board is of the view that it is unable, at that stage of its decision-making process, to take any additional facts or different facts into consideration. The Board will, therefore, make no consideration of this particular FAX transmission.

There is no indication that the matter outlined in the FAX communication was communicated to any of the other parties actively involved in the conduct of the appeal.

The time for bringing in facts to the Board had been adequately exposed to the public. As far as the Board is concerned this transmission is not admissible. The Board will disregard it entirely.

For a view of the Board's position on the proper admission of facts the Board will refer to an assessment decision being Cummings v. Director of Assessment, (1986) Vol 5-A, MBD page 26. At page 30 the Board says:

> "An inferior tribunal, the Board must still proceed in accord with the general principles of natural justice and "fairness". In the context of this appeal, that means:
>
> 1. The case must be decided by the Board on evidence properly admitted before the Board.
>
> 2. The evidence properly before the Board must be that evidence which has been introduced by a party at an open hearing on the record by and through a witness available to be cross-examined on his evidence by the opposing party.
>
> 3. The briefs called for were merely for comment upon, items (1) and (2) above (and suggestions for legal conclusions to be drawn from the facts) and were not opportunities to adduce new evidence of any nature - not to say that the new evidence might not be relevant or not to say that such new evidence might even be true. Such late evidence has not been tested, as is required by our legal system, in the crucible of an open on the record hearing before an impartial adjudicator, and has not been subjected to the acid test of cross-examination and/or the antidote of rebuttal.
>
> Thus, our legal system deals not in ideal solutions but in finite ones. A day, place and a time is set for the hearing. All parties are required to be ready at that time, place and day...It is a case of "now or never" for evidence....When all parties are finished, the evidence-taking aspect of the hearing is closed...a decision based on the applicable law and that evidence, and that evidence alone, leads to a decision. The ability to adduce evidence ceases when the evidence portion of the hearing is concluded...The decision maker can only contemplate the specific pieces of evidence put before him....This appeal...will be decided...in accordance with the applicable law upon relevant admitted evidence made upon the record in the manner set out summarily above..."

The Board sees no further necessity to re-state Cummings.

It also notes, in repetition, that in the attempt to adduce new evidence there ought not to have been any unilateral communication by any person with this Board.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of November, A.D., 1989.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM THE MUNICIPAL PLANNING STRATEGY OF THE MUNICIPALITY OF THE DISTRICT OF BARRINGTON.

Page 1

INTRODUCTION

...

The general intent of the Strategy is to promote and enhance the physical, social and economic growth of the Municipality so as to maintain a high quality of living environment. ...the Strategy serves as a guide to Council when dealing with future development proposals...

Page 3

HISTORY

...The earliest known colonists were the French who established a settlement and fort in 1627...

...In these formative years, fishing, lumbering and some agriculture were the mainstay of the area.

...the gradual decline of rail service as the road network was gradually improved. One such improvement was the completion in 1949 of the causeway linking Cape Sable Island with the mainland...

Page 5

PUBLIC PARTICIPATION

To prepare the Strategy, the Planning Advisory Committee initially conducted a series of public meetings in the spring of 1977...

Page 6

I. ENVIRONMENTAL DEVELOPMENT

General Development

Goal To secure a high quality living environment for all residents by ensuring that future development in the Municipality is harmoniously integrated within the context of both the man-made and material environment.

Objectives ...To protect residential, commercial, industrial development and the natural resources of the Municipality from the encroachment of incompatible land use activities.

Page 7

...

Economic Development

Goal To encourage the economic growth of the industrial, commercial and tourism sectors in order to maximize employment opportunities and related benefits for the residents.

Objectives To promote the development and expansion of commercial enterprises so as to best serve the residents of the Municipality.

To encourage the tourism industry to expand...

Page 9

A. GENERAL FUTURE DEVELOPMENT

MUNICIPAL WIDE PERSPECTIVE

...

Page 10

...a series of general development policies will establish a number of future urban and rural land use designations as well as address several municipal wide development issues and concerns.

Page 11

RURAL CENTRES

The Barrington-Barrington Passage area and the communities of Central and Lower Woods Harbour are the most highly developed areas in the Municipality. Given their more compact urban-like setting and diversity of land use activity, the likelihood of land use conflict in these communities is greater than in the more rural component. They also exhibit other urban type problems such as servicing (sanitary sewer) and lack of road frontage for development purposes.

BARRINGTON-BARRINGTON PASSAGE CORRIDOR

...The larger communities of Barrington and Barrington Passage anchor the north and south extremities of the area... The area is served by sanitary sewer facilities....64 percent of all commercial and business enterprises in the Municipality are located in the corridor area. Of this, 77 percent is concentrated in Barrington Passage...

Page 12

...

...these urban areas will likely continue as focal points of social and economic activity in the Municipality.

Page 13

...Council should designate the Barrington-Barrington Passage Corridor...as Rural Centres on the Generalized Future Land Use Map. ...future land use designations...policies as are necessary to ensure that development is directed to locate in a manner which minimizes land use conflict and optimizes the efficient use of land.

> A-1 It shall be the intention of Council to designate the Barrington-Barrington Passage Corridor and the Woods Harbour Area as Rural Centres on the Generalized Future Land Use Map 6 to accommodate a wide range of land use activities in a manner which minimizes future land use conflict and optimizes the efficient use of land.
>
> A-2 ...Rural Centres...Maps 7, 7A and 8...
>
> > i) Residential General - to accommodate residential development, institutional uses and other compatible uses; (refer to Policy B-1)
> >
> > ii) Central Business District - to accommodate a range of commercial uses not exclusively dependent upon highway trade as well as other compatible uses; (Refer to Policy C-25)...
> >
> > vi) Environmental Stress - to protect sensitive areas from development. (Refer to Policies A-5, A-6)

Page 14

RURAL MIXED DEVELOPMENT

The rural component comprises the larger portion of the mainland ... This area contains the bulk of residential development in the Municipality... Since the area contains the bulk of vacant land, it is expected that residential development will continue as the primary land use activity in future...

Page 16

...

PUBLIC AND PRIVATE ROADS

Page 18

...

Within the Rural Centres, it is essential that new development abut and front upon public roads...

A-9 It shall be the intention of Council to establish in the Land Use By-law a requirement that all new development within Rural Centres abut and front upon a public road listed and maintained by the Department of Transportation...

Page 20

...

MINIMIZING LAND USE CONFLICT

Generally speaking, land use conflict arises where developments of an incompatible nature encroach upon one another. This occurrence is no more evidence than where industrial

page 21

and commercial uses locate near existing residential or institutional development or vice versa... Council should establish special abutting yard restrictions in the Land Use By-law for new commercial and industrial uses or the expansion of existing commercial and industrial uses which abut existing residential or institutional uses...

A-17 It shall be the intention of Council to establish special abutting yard restrictions in the Land Use By-law for parking, loading, outdoor storage and outdoor display for new commercial or industrial uses or the expansion of such existing uses where any yard abuts an existing residential or institutional use in any area of the Municipality...

Page 23

...

PARKING

To minimize the potential for traffic congestion and accidents, Council should establish an adequate number of off-street parking spaces for various land use activities.

Page 24

> A-27 It shall be the intention of Council to establish parking requirements in the Land Use By-law to regulate the number of off-street parking spaces for uses permitted in any area of the Municipality...

Page 31

> B-7 It shall be the intention of Council to zone existing multiple family dwellings containing four (4) or more dwelling units as Residential Multiple (R-2) within the Residential General designation and to permit such new uses only by amendment to the Land Use By-law subject to the following criteria:
>
> a) that traffic noise and headlight glare do not cause nuisance effects upon abutting low density residential uses;
>
> b) that the proposed use conforms with all relevant criteria of Policy H-6 in the Implementation Chapter...

Page 44

COMMERCIAL DEVELOPMENT

Rural Centres

The Barrington-Barrington Passage Corridor is the focal point of commercial and business activity in the Municipality. Table II reveals that this activity is highly concentrated in Barrington Passage. Within this area, commercial development is distributed along Highway #3 and #330 from the causeway to the abandoned C.N.R. right-of-way which crosses Highway #3. Two distinct nodes of activity have evolved which are separated by a mixture of residential and highway commercial uses.

A long established and compact commercial core, interspersed with several residential and institutional uses has developed in the vicinity of Snow's Road and the Station Road. Pedestrian oriented, the area provides residents with a wide range of goods and services....

Given the close proximity to the Town of Yarmouth and Shelburne, it would appear that any rapid growth in commercial development in Barrington Passage is unlikely to occur in the near future. To accommodate new commercial uses and the expansion of existing uses, Council has established a Central Business District designation in the vicinity of Snow's Road and Station Road to accommodate a range of commercial uses which are not entirely dependant upon highway trade....The Council should also establish such other policies as are necessary to regulate development within these areas to minimize the potential for land use conflict with residential development.

Page 45

TABLE II

COMMERCIAL INVENTORY BY TYPE AND LOCATION[1]

Location	Motel
Barrington Pass.	1...

Page 46

> C-25 Within the Central Business District designation ...it shall be the intention of Council to guide future development by establishing in the Land Use By-law a Central Business District (C-1) Zone to permit a wide range of commercial uses which are not exclusively dependant [sic] upon highway trade as well as other compatible land use activities including existing residential uses and industrial uses identified in Schedule "F" of the Land Use By-law.
>
> C-26 It shall be the intention of Council to zone as Central Business District (C-1) all lands within Central Business District designation to permit the expandion [sic] of existing commercial uses and the establishement [sic] of such new uses. (Refer to Policies A-2, A-9, A-17 and D-3).
>
> C-27 It shall be the intention of Council to permit the expandion [sic] of existing commercial and business uses and the establishement [sic] of such new uses in areas immediately adjacent the Central Business District designation only by amendment to the Land Use By-law subject to the following criteria:

a) that traffic noise and headlight glare does not cause nuisance effects upon abutting residential uses in the adjacent Residential General designation;

b) that the development conforms with all relevant criteria of Policy H-6 in the Implementation Chapter. (Refer to Policies A-9, A-17 and D-3)....

Page 52

...

TOURISM

...To improve the tourism sector...more overnight accommodations such as motels and camping sites should be encouraged.

C-37 ...

b) encourage the upgrading of existing tourist accommodation facilities such as motels, campgrounds and restaurants; and

c) the construction of new tourist facilities.

Page 53

...

C-39 It shall be the intention of Council to encourage the development of low-cost day trip facilities...

C-40 It shall be the intention of Council to participate in and support regional attempts to improve tourism in the region.

Page 58

D. MUNICIPAL SERVICES AND WATER RESOURCES

SANITARY SEWER

Rural Centres

The Barrington-Barrington Passage Corridor has already experienced the problems associated with older, malfunctioning or improperly installed on-site waste disposal systems... a central sanitary sewer system and treatment plant was constructed in 1976...domestic water is obtained from dug or drilled wells...

...New multiple family residential uses, as well as new commercial and industrial uses should be required to connect to sanitary sewer services...

Page 64

F. TRANSPORTATION SERVICES

...

There are four road classifications as determined by their design and function. They include local roads such as Snow's Road; collector roads, including Highway #330 and the Village-dale Road; the arterial Highway #3 and the controlled access Highway 103....

F-1 ...

a) assist the Department of Transportation in evaluating road conditions, hazards and solutions to them;...

Page 65

The lack of frontage along existing road network in Urban centres is an issue which Council must address if these areas are to develop in future. In the Barrington-Barrington Passage Corridor, Council should make allowance for a proposed collector road linking the Wireless Road with Snow's Road.

...

WATER TRANSPORTATION

...

F-3 It shall be the intention of Council to encourage the maintenance and improvement of wharf facilities throughout the Municipality. (Refer to Policy C-4).

...

CHAPTER VI

IMPLEMENTATION

Page 69

H. GENERAL PROVISIONS

General

H-1 The Municipal Planning Strategy for the Municipality of Barrington is a policy document providing the framework by which the future growth and development of the Municipality shall be encouraged, regulated and co-ordinated. The Policies of the Strategy will be implemented through a variety of means but generally through the powers of the Council as provided by The Planning Act, The Municipal Act and any other statutes as may apply.

H-2 In addition to employing specific implementation measures, it shall be the intention of Council to maintain a program of ongoing planning through its Planning Advisory Committee. Such a program may include but shall not be restricted to any of the subject areas mentioned in this Strategy, special studies, concerns of a regional, environmental, economic matter and any other matters which Council considers suitable.

H-3 In order that decisions may be based on expert advice...Council...circulate applications for amendments to the Land Use By-law and applications...to the appropriate provincial government agencies such as Departments of Health, Transportation, Environment, and Municipal Affairs for their information, comment or approval as may be required.

H-4 The principal mechanism by which land use policies are implemented is the Land Use By-law. The Land Use By-law...shall reflect the policies of the Municipal Planning Strategy...

Page 70

H-5 ...within the designations as set out in the Generalized Future Land Use Maps, various zones will be established and no zoning amendments shall be permitted except in conformity with all policy intentions of this Strategy.

Criteria for Amendment to the Land Use By-law.

H-6 In considering amendments to the Land Use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:

a) that the proposal is in conformance with the intentions of this Strategy and with the requirements of all other municipal by-laws and regulations;

b) that the proposl is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy and proximity of schools, recreation and any other community facilities;

iii) the adequacy of road networks in, adjacent to, or leading to the development;

Page 71

iv) creating a negative impact upon the natural resource base.

c) suitability of the proposed site in terms of steepness of grade, soils and geogolical [sic] conditions, location of watercourses and the proximity of highway ramps, and other nuisance factors...

page 72

...

Review of the Municipal Planning Strategy

H-14 In accordance with Section 49...this Strategy may be reviewed when either the Minister of Municipal Affairs or Council deems it necessary but in any case shall be reviewed within five years from the date of its coming into force or the date of its last review....

EXISTING LAND USE MAP - M4;

MAP 6, MUNICIPALITY OF THE DISTRICT OF BARRINGTON GENERALIZED FUTURE LAND USE MAP - RURAL CENTRE

MAP 7, BARRINGTON/BARRINGTON PASSAGE CORRIDOR RURAL CENTRE GENERALIZED FUTURE LAND USE MAP - CENTRAL BUSINESS DISTRICT

EXCERPTS FROM THE MUNICIPALITY OF THE DISTRICT OF BARRINGTON LAND USE BY-LAW APPROVED BY THE DEPARTMENT OF MUNICIPAL AFFAIRS DECEMBER 16, 1985. (TAKEN FROM EXHIBIT V-7)

Page 1

DEFINITIONS

1. Accessory Building means a subordinate building or structure on the same lot as the main building devoted exclusively to an accessory use.

2. Accessory Use means a use subordinate and naturally, customarily and normally incidental to and exclusively devoted to a main use of land or buildings and located on the same lot.

3. Alter means any change in the structural component of a building or any increase in the volume of a building or structure....

Page 2

...

6. Block means the smallest unit of land which is bound entirely by public streets, rivers, railroads, public parks or any combination thereof...

Page 3

...

12. **COMMERCIAL BUILDING**

a) Commercial Building means a building from which one or more businesses are caried on.

b) Group Commercial Building means two or more abutting commercial buildings each of which is separately owned and located on a separate lot and which have separate entrances and loading spaces and characterized by the sharing of common parking areas and driveways.

c) Group Commercial Facility means two or more individual group commercial buildings characterized by the sharing of common parking areas and driveways...

Page 4

15. Council means the Council of the Municipality of the District of Barrington...

18. Development means any erection, construction, addition, alteration, replacement or relocation of or to any building or structure and any change or alteration in the use made of lands, buildings or structures...

Page 6

...

21. Erect means to build, construct, reconstruct, alter or relocate and without limiting the generality of the foregoing shall be taken to include any preliminary physical operation such as excavating, grading, piling, cribbing, filling, or draining, or structurally altering any existing building or structure by an addition, deletion, enlargement or extension...

Page 7

24. Existing means existing as of the effective date of this By-law...

26. Floor Area:

a) Commercial Floor Area means the total usable floor area within a building used for commercial purposes but excludes washrooms, furnace and utility rooms and common malls between stores....

Page 9

...

32. Hotel or Motel means a building or buildings or part thereof on the same site used to accommodate the travelling public for gain or profit, by supplying them with sleeping accommodation with or without meals but without private cooking facilities...

Page 12

...

41. Main Building means the building in which is carried on the principal purpose for which the building lot is used...

Page 14

...

51. Parking Area or Lot means an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, employees, customers or residents and which has adjacent access or permits ingress or egress of motor vehicles to a street or highway by means of driveways, aisles or manoeuvring areas where no parking or storage of motor vehicles is permitted.

52. Parking Space means an area of not less than one hundred sixty (160) square feet, measuring eight (8) feet by twenty (20) feet exclusive of driveways or aisles, for the temporary parking or storage of motor vehicles and which has adequate access to permit ingress and egress of a motor vehicle to and from a street or highway by means of driveways, aisles or manoeuvring areas.

...

Page 16

...

61. Restaurant means a building or part thereof where food and/or drink is intended to be served to the public for consumption within the building...

Page 18

...

72. a) Street or Road means the whole and entire right-of-way of every highway, road, or road allowance vested in the Province of Nova Scotia or the Municipality of the District of Barrington.

Page 19

b) Private Road means any street or road which is not public shown in a plan of subdivision...

75. Tourist Establishment means a building or buildings which are used to accommodate the travelling public for gain or profit by supplying them with sleeping accommodation, with or without means, and shall include a guest house, tourist cabins, a motel and a hotel...

Page 20

...

80. Zone means a designated area of land shown on the Schedules of this By-law.

Page 21

PART III

ZONES AND ZONING MAPS

1. For the purpose of this By-law, the Municipality of the District of Barrington is divided into the following zones, the boundaries of which are shown on the attached Schedules. Such zones may be referred to by the appropriate symbols.

Zones	Symbols
...	
Central Business District	C-1
...	

ZONING MAPS

...Schedules..."B"

DETAILED SCHEDULES

Schedule "B" - Barrington-Barrington Passage Corridor Rural Centre (Barrington Passage/Crowell Area)

...

Page 22

ZONES NOT ON MAPS

3. The Zoning Maps of this By-law may be amended, in

conformance with the Municipal Planning Strategy, to utilize any zone in this By-law, regardless of whether or not such zone had previously appeared on any Zoning Maps....

Page 23

PART IV

INTERPRETATION

...

Page 24

...

CERTAIN WORDS

4. In this By-law, words used in the present tense include future; words in the singular number include the plural, words in the plural include the singular number; and the word "used" includes "arranged", "designed or intended to be used", and the word "shall" is mandatory and not permissive.

PROHIBITED USES

5. In this By-law, any use not listed under permitted uses in a particular zone is prohibited.

Page 25

PART V

GENERAL PROVISIONS FOR ALL ZONES

SCOPE

1. a) No building or structure shall hereafter be erected or altered, nor the use of any building, structure or lot hereafter be changed unless a development permit has been issued and no development permit shall be issued unless all the provisions of this By-law are satisfied...

Page 26

ACCESSORY USES PERMITTED

4. Where this By-law provides that any land may be used or a building or structure may be erected or used for a purpose, the purpose includes any use accessory thereof...

Page 28

...

ONE MAIN BUILDING ON A LOT

16. No person shall erect more than one (1) main building on a lot except for:

> a) buildings located in the Central Business District (C-1)...

Page 31

...

PARKING REQUIREMENTS

22. For every building or structure to be erected or enlarged, off-street parking located within the same zone as the use and having obstructed [sic] access to a public road shall be provided and maintained in conformity with the following schedule:

Type of Building	Parking Required
...	
Page 32	
c. auditoria, restaurants, private clubs and other place assembly	...where there are fixed seats one (1) parking space for or every five (5) seats, or ten (10) feet of bench space. Where there are not fixed seats one (1) parking space for each one hundred (100) square feet of gross floor area devoted to public use...
h. hotels, staff houses, motels, tourist cabins	one (1) parking space per suite or rental unit plus one (1) additional parking space for each fifty (50) square feet of floor area devoted to public use (taverns, restaurants and auditoria)...
Page 33	
...	
n. all other commercial uses	one (1) parking space for each three hundred (300) square feet of commercial floor

area...

STANDARDS FOR PARKING AREAS

23. Where parking facilities for more than four (4) vehicles are required or permitted, the parking area shall be maintained with a stable surface that is treated to prevent the raising of dust or loose particles.

...

Page 58

PART XV

CENTRAL BUSINESS DISTRICT (C-1) ZONE

(C-1) PERMITTED USES

1. The following uses shall be permitted in any Central Business District (C-1) Zone:

...

Hotels and motels;

...

Restaurants;

...

Page 59

...

SPECIAL REQUIREMENT; CENTRAL BUSINESS DISTRICT (C-1) ZONE USES

4. All uses in the Central Business District (C-1) Zone are subject to the general provisions of Part VIII.

...

Page 66

PART XIX

ADMINISTRATION

ENFORCEMENT;

1. This By-law shall be administered by the Development

Officer.

...

SCHNARE v. DISTRICT OF CHESTER

PLANNING - DEVELOPMENT AGREEMENT - SALVAGE YARD - REFUSAL- STREET FRONTAGE - PLANNING ACT, S. 72 - MUNICIPAL BOARD RULES, S. 17 - DISTRICT OF CHESTER L.U.B. S. 4, 11.

Appellant owns 3 lots comprising 10 acres and sought a development agreement for a 100' x 100' salvage yard. Council rejected proposal. A subdivision of the land is required. Past history as a salvage yard reviewed.

HELD: Appeal dismissed.

The lot does not meet the L.U.B. requirements for street frontage. Even if Board allowed the appeal the development officer could not issue a development permit. Current access for vehicular traffic in and out of the area is inadequate. The proposal is premature.

NSMB-19-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, ch. 9, by **ROY SCHNARE** from a decision of the Council of the **MUNICIPALITY OF THE DISTRICT OF CHESTER** made the 29th day of May, 1989, refusing to enter into a development agreement to permit a salvage yard operation at Chester Commons.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: NANCY M. PEERS, LL.B., on behalf of the Appellant, **Roy Schnare**;

DEREK WELLS, LL.B., on behalf of the **Municipality of the District of Chester**, Respondent.

HEARING DATES: September 19, 1989;
September 20, 1989;
September 27, 1989.

DECISION RENDERED: November 15, 1989.

DECISION: **Appeal Dismissed.**

DECISION

Council of the Municipality of the District of Chester refused the request of the Appellant, Roy Schnare, for a development agreement to allow a salvage yard on his lands. Mr. Schnare appealed this decision to the Board.

The Notice of Appeal, dated June 14, 1989, complained of a decision of the "Chester Municipal Council", made May 29, 1989. The Board received this Notice of Appeal on June 15, 1989.

The grounds of appeal are:

> "That the proposal can not reasonably be said to be inconsistent with plan policy or with policy 6.2 and policy 9.6 of the Municipal Planning Strategy of chester Village and area."

Under Section 16(1) of Chapter 9, S.N.S. 1981, the **Municipal Board Act**, the Chairman assigned Board Member Richard L. Weldon to her this planning appeal.

The Board heard this appeal at the Board's September 19th, 1989, sittings held at the County Council Chambers, Chester, Nova Scotia.

The Appeal started about 10:00 a.m. on September 19, 1989 at the Council Chambers. The hearing continued the night of the 19th at 7:00 p.m., for particular attention to input from the public. On the 20th, during regular business hours, the Board continued the hearing. When the Board did not finish, the hearing continued on the 27th. The evidentiary portion of the hearing and argument concluded on that day.

The Appellant made proof of appropriate service of the Notice of Hearing, Notice of Appeal and all the necessary documents. All necessary procedural arrangements for the appeal have been fulfilled. The Board found that it had jurisdiction to hear this appeal on the merits.

The land in question consists of three contiguous lots of land situated almost entirely within the planning area in the M.P.S. for Chester Village. They lie on the Northeast side of a

"15-foot" wide public right-of-way called a "road". This road appears, marked in brown, on the Exhibit S-11, a Plan of Chester Village and area. The three lots together contain about 10 acres. The ten-sided figure that they make appears in red on that Exhibit. The land runs easterly or northeasterly from the "road". Although the land has ten sides, it is basically in a rectangular form, long and narrow. The narrow portion fronts on the "15-foot road". The long part of the rectangle is its depth. Two small triangular portions of the lands towards the northeast at its eastern-most extremities are outside the planning area boundary. These portions of the lands outside the boundary do not feature in this appeal.

About midway a watercourse (brook) intersects the land from north to south. It is marked in blue on Exhibit S-7. This brook runs from above the lands and outside the planning area through the lot in a general southerly direction. It discharges eventually into the sea.

The subject land is under occupation towards the front and to the north of its internal roadway where there is a small blue house owned by Roy Schnare. Directly behind his house, in its backyard, are numerous car bodies, the count of which varies from time to time.

Directly south of these car bodies and the small blue house is the internal roadway. This internal roadway runs back basically through the centre of the property, over the brook. It ends in a cleared area to the east of the brook. This cleared area will be called the "compound" and more fully described later in this decision. Near the public right-of-way to the south of this internal roadway one finds a house trailer owned and occupied by Mr. Schnare. Apparently the bulk of the acreage lies to the north of the internal road. Towards its furtherest extremity, the internal road follows the southern boundary line of the property in question.

Road access to the Schnare lot from the west is from a northerly direction over the "road". One must traverse a couple of other small secondary roads before arriving at the paved public highway. Leaving the paved public highway with a right-angle turn, you make at least four more right angle turns to get to Schnare's. At least that is the route the Board followed when it viewed the site.

Northerly from the subject property along the private "road" to the first intersection there are several houses. Along the north side of the subject property people have built and inhabit some houses. Inhabitants of these houses have a view of the front part of the subject property including the cars behind Mr. Schnare's house.

Natural tree growth and distance shield the compound from such view.

The Appellant, Roy Schnare, purchased the land in one deed in three blocks in 1979. At the time he purchased the land there were at least two car bodies on the site. At least one of these car bodies may still be on the site. There are 10 or 12 car bodies located in the compound as of the dates of the hearing. There are a greater number of car bodies near Mr. Schnare's house at the front of the lot.

The following Sections of the **Planning Act**, S.N.S. 1983, c. 9, appear to bear directly on this appeal:

> "72(1) Where a council has refused to enter into an agreement after application has been made to it pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board.
>
> 55(1) Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for development by agreement shall identify matters that the council shall consider prior to the approval of an agreement and the developments that are subject to agreement.
>
> (2) Where a municipal planning strategy contains policies pursuant to subsection (1), the land-us by-law shall identify the developments to be considered by agreement.
>
> 56(1) Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for the establishment of a comprehensive development district shall identify matters that the council shall consider prior to the approval of an agreement for the development of the comprehensive development district and shall provide for the classifications of uses that are to be considered for a comprehensive development district or districts.
>
> (2) Where policies have been adopted pursuant to subsection (1), the land-use-by-law may designate an area or areas as a comprehensive development district.
>
> 38(2) A municipal planning strategy or an intermunicipal planning strategy may include statemetns of policy with respect to any or all of the following:
>
> ...
>
> (p) policies governing
>
> i) the use of development agreements in accordance with Section 55,

ii) the establishment of comprehensive development districts in accordance with Section 56,

iii) the use and application of conditions in accordance with Section 57;

72(2) A decision of the council pursuant to subsection (1) shall provide the applicant with the reasons for the decision.

(3) An appeal pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the decision of the council.

(4) The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall

a) refer the matter back to the council; and

b) instruct the council to hold a public hearing, if this had not been carried out prior to the appeal being made by the applicant,

and the same requirements for notice and the holding of the hearing apply to a hearing under this Section as are required before the council enters into a development agreement.

(5) A determination of the Board pursuant to subsection (4) shall contain reasons for the determination.

(6) If the council and the applicant have not approved the terms of an agreement within ninety days of the date of the determination of the Baord, or within ninety days of the procedures being completed pursuant to subsection (4), either the council or the applicant may apply to the Board for an order fixing the terms of the agreement.

(7) In an application pursuant to subsection (6), the Board may make any decision the council could have made, except that no order shall be made which commits the council to make any expenditures with respect to the development to be permitted pursuant to this Section."

Given the result of this appeal, Section 29 of the **Municipal Board Act** has application in this appeal:

> "In any matter before it, the Board shall grant an order, either as specified in the application or notice of appeal or as the Board decides, and may by order dismiss the application or appeal."

At the request of the solicitor for the Municipality, the Board held a pre-hearing conference immediately before the hearing. Some discussion arose between counsel. Should Exhibit S-7, "Appeal Record, Roy Schnare - Salvage Yard 1989", be the only municipal records admitted in the appeal? There was an additional document prepared "Background Record - Roy Schnare Salvage Yard Chester 1981 - 1986" (Exhibit S-6). The Municipality alleged Exhibit S-6 was irrelevant and therefore inadmissible. The Board at the pre-hearing decided that it would admit both documents subject to later objections to any of their contents.

The **Rules** of the Board on Planning deal with an appeal record in Section 17. Section 17 lists the municipal content of the appeal record. The sub-sections in question seem to be 17(2)(e), (f) and (g); 17(3); 17(4) are as follows:

> "(e) a copy of the minutes of any public hearing respecting the subject of the appeal;
>
> (f) a copy of the minutes of any council meeting at which the subject of the appeal was discussed;
>
> (g) a copy of any report, letter, submission, recommendation or other matter respecting the subject of the appeal which was submitted to or was considered by council or the Development Officer, excluding any legal opinion prepared for the Municipality.

3) The pages of the Appeal Record shall be numbered.

4) Nothing in this section shall be deemed to prejudice the right of any party to inspect and obtain copies of any documents prior to the time that the Appeal Record is to be filed."

The Board first wishes to comment on the easiest portion Rule 17(3). "The pages of the Appeal Record shall be numbered." The Board suggests that the numbering not be done backwards. It suggests making page 1 the earliest document and following immediately from that. This particular Appeal Record appeared with the most recent document being on top and the most ancient document at the back. Thus the page numbers could be in reverse. The first page of a letter would be, say, page 47 and, if it was a two-page letter, the second page would be page 46 in the Appeal Book. This is not a conventional method of numbering. One should number the appeal record in a more conventional manner starting with the oldest document at page 1. The paging then would follow in more logical, conventional and convenient sequence.

The Appeal Record Exhibit S-7 is correct and admissible. The other documents in Exhibit S-6 are relevant admissible documents. If they were were part of the Appeal Record they would be admissible under, at least, Rule 17(g). The Board has reconsidered the submissions of irrelevancy. After doing so, it still sees no reason not to include both records submitted.

In planning matters, a wide spectrum of interests prevail. The Board has a wide mandate to consider relevant planning considerations, viz histories and the like. This allows the Board to get a "feel" for the community in which it is interpreting the planning law. Planning in a community bases itself on human needs and human concerns of the broadest nature. Broad evidence relating to such needs and concerns is therefore relevant. Relevant evidence is admissible. The Board confirms its initial reaction on admissibility given at the pre-hearing conference.

Mr. Schnare was occupying the land himself and for a time was working on some of the car bodies.

Probably because of a municipal or some personal complaints, the Salvage Yard Licensing Board inspectors attended upon Mr. Schnare's. After they visited, Mr. Schnare applied to the Municipality for a rezoning. He then also applied for a salvage yard license to protect himself in the operations he was conducting on the site.

The Board will spend some time in dealing with the various attitudes expressed by the Salvage Yard Licensing Board over the years.

One particular part of this appeal disturbs the Board. The events concerning this present application have a history. That history goes back at least to 1981 and comes forward until the decision of Council in 1989.

Mr. Schnare was incensed by his treatment by the authorities compared to the treatment given a distant neighbour.

Mr. Schnare's neighbour, in a similar location, also used his own property as a salvage yard. Mr. Schnare felt this distant neighbour received preferential treatment from the Municipality in order to establish a salvage yard. This other salvage yard is about 1/8th of a mile away from Mr. Schnare's property.

In order to get an understanding of the delay in the timing of the processing of Mr. Schnare's application, the Board would like to sort through Exhibits S-6 and S-7. It will first pick out the Salvage Yard Licensing type of function that Mr. Schnare had to deal with.

On November 26, 1981, Acting Supervisor, Salvage Yard Licensing Board, J.F. Fraser, under the Board of Commissioners of Public Utilities letterhead, wrote this letter, excerpts as follows:

> "Re: Salvage Yard Licensing Act
>
> It has been reported to the Board by a member of our inspection staff that there are 3 semi-stripped vehicles located approximately 700' east of the Commons Public Highway on property occupied by you at the above address.
>
> These vehicles are stored at this location in violation of Section 2 of the Salvage Yard Licensing Act and we must, therefore, ask that same be removed within 15 days from the date of this letter. Enclosed is an information sheet and Salvage Yards Licensing Act.
>
> The Municipality of Lunenburg is presently conducting a derelict vehicle clean up program and if you contact their contract hauler, Mr. William Faulkenham, 275-3072, he may be able to remove these vehicles for you free of charge. Your attention to this matter will be appreciated."

This letter enclosed an information sheet and an Act.

On the information sheet it stated many things:

> "1. No person can own or occupy land within 1500 feet of the center line of the travelled portion of a highway outside a city or incorporated town in the Province of Nova Scotia and upon which used bodies or parts of automobiles or used bodies or parts of other vehicles or machinery or used goods, materials or equipment of any kind are placed, stored or kept without having obtained a license with respect to such land permitting such use issued by the Board of Commissioners of Public Utilities under the Salvage Yards Licensing Act.
>
> 2. The Act applies to every person who owns or occupies such land. It applies not only to persons who carry on salvage, scrap, garage or other businesses but also to any person who has any used automobile bodies or any such used goods, materials or equipment on such land. It applies to a small quantity of materials as well as a large quantity.
>
> 3. A license cannot be issued by the Board unless the Board is satisfied that the land where the used automobile bodies or other used goods, materials or equipment are placed, stored or kept will not be unsightly or offensive to any part of the travelling public.
>
> 4. A license cannot be issued by the Board unless the Board is satisfied that use of the land for such purposes will not contravene any provision of the Public Health Act, the Municipal Act, the Town Planning Act, the Water Act, the Environmental Protection Act, the Public Highways Act, or by-laws, rules, regulations or orders made under any of the said Acts.
>
> 5. A license cannot be issued by the Board unless the Board is satisfied that no part of such land is within 500' of a public park, public playground, public bathing beach, school, church or cemetery.
>
> 6. The Board has authority to issue a conditional license under which a person may be granted a reasonable time within which time to improve such land so that it will not be unsightly or offensive. Such conditional license will contain the terms and conditions to be met by a person to enable him to obtain a license. These terms and conditions may related to such matters as relocation and rearrangement of materials, fencing, excavation, construction, painting and other works.

> 7. The license to be issued by the Board is an annual license expiring December 31st of each year.
>
> ...
>
> 9. A person who violates any provision of the Act or of the Regulations or of the terms, conditions or restrictions imposed by the Board in respect of a conditional license is liable to a penalty of not more than $500.00 and in default of payment to imprisonment for a term of not more than 90 days.
>
> 10. Many persons who now have used automobile bodies or other used goods, materials or equipment on land that is owned or occupied by them within 1500' of such highways will not wish to continue to use the land for this purpose. Many other such persons will realize it to be impossible to improve the land so that it will not be unsightly or offensive because of the nature and location of the land itself or because of the expense of making satisfactory improvements. The Board urges all such persons to take immediate steps to remove such automobile bodies or other used materials.
>
> 11. Application forms and additional information may be obtained from the...".

If this factual information contained in this letter is correct, the message is quite clear. Mr. Schnare was in violation of the **Salvage Yards Licensing Act**. He had no license. He required one if he wished to continue in his use of the land as a salvage yard.

By December 1981, Mr. Schnare knew to obtain a Salvage Yard License he had to rezone a portion of his land in order to continue his salvage yard use. The existing zoning on the land was R-1. He applied to the Municipal Clerk in writing for the rezoning to allow salvage yard use. He sent a sketch map in support of the application. The letter from the Board of Commissioners of Public Utilities (P.U.B.) obviously had a prompt effect on Mr. Schnare.

Roy Schnare made an application to the P.U.B. in the matter of the **Salvage Yards Licensing Act** in 1986. Its hearing occurred on June 9, 1982.

The P.U.B. decision and order starts at page 15 of Exhibit S-7. The P.U.B. Order of December 3, 1982, shows that the P.U.B. gave careful consideration to facts and representations similar to those made concerning this hearing. At page 4 of its decision, however, the P.U.B. stated that with appropriate safeguards these concerns could be overcome and a license may safely issue:

> "...Accordingly, a license will issue to the Applicant provided the Board first receives confirmation:
>
> 1. From the Municipality of the District of Chester that the Applicant has met its zoning requirements;
>
> 2. From the Board's staff that satisfactory fencing along the front of the salvage yard has been installed.
>
> In addition, it will be a condition of the license that, to quote the Environment Department's letter of July 5, 1982, no vehicles or parts thereof shall be located "within 100 feet of the stream in question". The Board believes this requirement will meet health and environmental concerns and will go some distance...It should be pointed out that salvage yards licenses are only issued for a year at a time and this condition will be rigidly enforced by the Baord's inspection staff."

In the body of its decision, the P.U.B. also made several interesting findings of fact starting on page 1:

> " ...
>
> The proposed salvage yard is located at East Chester in the Municipality of the District of Chester. The general area is frequently referred to as Chester

Commons. It is described as follows in the Notice of Hearing:

> "...commencing at a point approximately 800' east of the centre line of the highway and approximately 475' east of the Old Fred Zink Road, comprising an area approximately 500' north to south parallel with the highway and 650' east to west, being a portion of property owned by Roy Albert Schnare."

The Old Fred Zink Road is a short unpaved road and is not a highway to which the Public Highways Act applies. There are about three houses on it in addition to the Applicant's. The highway mentioned in the application is a paved road lying parallel to and a short distance west of the Old Fred Zink Road. It is a "listed" public highway and as it is within 1,500 feet of the Applicant's premises the yard must meet the requirements of the Salvage Yards Licensing Act.

The proposed site is surrounded on three sides by woods. The side facing the Old Fred Zink Road is open and as the land is fairly level the Board's inspector recommends that it be fenced. The site itself will require further clearing before it can be used to hold a substantial number of vehicles. The Applicant's house lies between the yard and the Old Fred Zink Road. He has erected a garage behind the house and proposes to operate a body shop on a limited, part-time basis. He envisages storing old vehicles in the yard, using parts in his body work business and selling old vehicles from time to time to mobile crusher operators.

A brook runs north to south on the salvage yard, very close to, if not actually on, its western boundary. It runs into a twenty to thirty foot diameter man-made pond which is on the Applicant's property although not on the salvage yard. In accordance with the Board's usual practice, notice of the application was given to the Departments of the Environment and Health. The Department of the Environment wrote to the Board on May 18, 1982 and stated the following: "We have visited the above site and there would appear to be no problems within our area of concern provided no salvage will be within 100 feet of the stream fed pond at the eastern end of the property." The Department of Health's letter to the Board dated May 31, 1982, stated that "This site has been inspected and is not recommended for use as a salvage yard, due to environment conditions and land use downstream". In view of the divergence of departmental opinions and the weight the

> Health Departmental apparently placed on environmental considerations, the Board requested the Department of Environment to review its previous findings. The Department replied as follows by letter dated July 5, 1982:
>
> > "Further to our conversation of June 25, 1982, this will serve to reiterate this Department's position concerning the above.
> >
> > It was the finding of our staff that, provided no vehicles or parts thereof are located within 100 feet of the stream in question, there would appear to be no problems within our area of concern".
>
> ...
>
> The Applicant's property is located in a residential zone. A salvage yard is not a permitted use in a residential zone. The Lunenburg County District Planning Commission has advised the Board that it anticipates that a new zoning by-law will be adopted in the near future. The Applicant's property will fall in a "rural resource" zone and a salvage yard could then be operated on the Applicant's property provided he first enters into a Development Agreement with the Municipality. Alternatively, the Applicant could proceed immediately with a rezoning application under the existing zoning by-law."

The P.U.B. delivered an accurate, well-reasoned decision directed to the property presently in question. The P.U.B. decided, admittedly, on other concerns rather than direct planning concerns. Its decision shows the state of the property on an application for a Salvage Yard License made in 1982. This application to the P.U.B. has in many ways dealt with facts similar to those now before the Board.

This P.U.B. decision clearly spelled out that the Applicant could wait until the change of the Municipal Planning Strategy (M.P.S.) to accommodate a salvage yard. In the alternative, he could immediately apply for rezoning.

The P.U.B. mailed its decision to Mr. Schnare on December 7, 1982. It sent a copy to Mr. Eugene Graves, Department of Public Health and Department of Environment.

The P.U.B. follow-up again comes to a head on October 26, 1984. Its 1984 Order shown on page 56 of Exhibit S-6 recites:

> "WHEREAS the application of Roy Albert Schnare of Chester in the County of Lunenburg for the issue of a salvage yard license with respect to premises briefly described as:
>
> > A lot of land located in the Municipality of the County of Lunenburg situated in the Vilage of Chester commencing at a point approximately 800 feet east of the center line of the highway and approximately 475 feet east of the Old Fred Zink road, comprising an area approximately 500 feet north to south parallel with the highway and 650 feet east to west, being a portion of property owned by Roy Albert Schnare
>
> was filed with the Board on the 14th day of April, 1984;
>
> AND WHEREAS it now appears that it is not the intention of the Applicant to use the said premises for the storage of automobile bodies and similar materials;
>
> IT IS ORDERED that the said application of Roy Albert Schnare be and it is hereby dismissed."

It is apparently clear from the correspondence that any conditional license previously received has now disappeared. This P.U.B. mailed its 1984 decision to Mr. Schnare on October 26, 1984.

On July 3, 1985, on the same P.U.B. letterhead, A.P. Doney, Supervisor, Gasoline and Salvage Yards Licensing Divisions, wrote to the Municipality. Concerning Roy A.

Schnare, Chester, N.S. he wrote:

> "...The Salvage Yards Licensing Act controls the storage of auto bodies, parts of automobiles, etc., within 1500 feet of a public highway and we will enforce the Salvage Yards Licensing Act within this jurisdiction, however, it is our understanding that Mr. Schnare's property extends beyond 1500 feet where we have no control or jurisdiction."

This letter is in direct conflict with the findings made by the P.U.B. on at least one previous occasion. The P.U.B. had previously found the subject property was clearly within much less that 1500 feet of a public highway. There is no evidence before the Board there has been any closure or opening of highways in the area since 1982.

In any event, by January 3, 1985, on official-looking stationery, an officer of the P.U.B. was saying that the P.U.B. had no jurisdiction over this particular property.

On March 14, 1985, the same person wrote the Municipality again:

> "...I understand from our conversation that your concern is apparently for a number of vehicles stored in a wooded area to the rear of the property not in public view, but which may be within 1500 feet of the public highway. Our earlier reports indicate that a number of vehicles had been moved to this area beyond 1500 feet of the public highway, this may not be the Old Fred Zinck Road but is reported to be beyond 1500 feet of the public highway located some distance west of the Old Fred Zinck Road. However, as requested, we will have our Inspector check this property again in this regard."

On March 26, 1985, the same individual wrote to the Municipality:

"...There was a 1/2 ton truck with a number of parts

> removed and a truck frame with wheels attached stored on this property adjacent to the repair garage. It was also noted that there were 4 semi-stripped vehicles at the rear of the property but within 1500 feet of the public highway. Mr. Schnare was instructed by letter to have these materials removed and advised that if he wishes to continue to use these areas for the storage of such materials, he must first make the necessary arrangements with the Municipality and again apply for a salvage yard license permitting this use of said land. Follow up inspections will be carried out to ensure that the regulations are complied with."

On March 26, 1985, this same individual wrote to Mr. Schnare:

> "...Also it was noted that there were 4 semi-stripped vehicles at the rear of your property but within 1500 feet of the public highway.
>
> As you are well aware, these vehicles and materials are stored at this location in violation of Section 2 of the Salvage Yards Licensing Act and must, therefore, be removed without delay. If you wish to use this area for the storage of such materials you must first apply to the Municipality and make the necessary zoning arrangements and then apply to the Board of Commissioners of Public Utilities for a salvage yard license permitting the storage of such materials at this location.
>
> Please be advised that continued violations of this nature makes you liable to prosecution under Section 2 of the Salvage Yards Licensing Act. We are again enclosing an information sheet explaining this Act and your attention is directed to page 2, paragraph 9. Your prompt attention to and co-operation in this matter will be appreciated."

In May, 1985, counsel on behalf of Mr. Schnare, wrote to the same Mr. Doney. This is a long and detailed letter (found at page 71 of Exhibit S-7). It related to the P.U.B.'s decision in 1984 which dismissed an application for license on the grounds that the Applicant was not going to use the premises:

> "...Mr. Schnare indicates to me that the reason the application was withdrawn is that he was informed by Mr. M.R. Smith, Inspector, Salvage Yards Licensing Division in Liverpool that a license was not required.

Further in paragraph 6 of the letter:

> ...Mr. Smith was of the view that no violation of the Salvage Yard Licensing Act had taken place.
>
> ...Let me make it clear from the outset that Mr. Schnare wants nothing more than to conform with any regulations which may apply to his property with respect to any activities which he may be carrying on there. Mr. Schnare feels however that he is "getting the run around" in that he cannot get a definitive response to his attempts to comply with the law. As such he has retained this law firm.
>
> ...Alternatively, we would ask for a determination from you Division that Mr. Schnare is not operating in contravention of the Salvage Yard Licensing Act. ...When he gets conflicting opinions from officials of the same Government Department, it is difficult for him to know what to do."

On September 1, 1988, the Municipality again wrote the Chief Inspector, Salvage Yards Licensing Division, concerning Mr. Roy Schnare:

> "As you may be aware, Mr. Roy Schnare had applied to Municipal Council for a Development Agreement to permit him to establish a salvage yard on Chester Commons. You may have delayed granting him a permit pending approval of this agreement by Council.
>
> I wish to inform you that Council has turned down Mr. Schnare's request for a Development Agreement.
>
> There is, however, still the matter of a number of salvaged autos stored on his property at Chester Commons. Since he does not have a license for the operation of a salvage yard, we would now expect your Department to have these cars removed without further delay."

Mr. Schnare's property has long been encumbered with considerable numbers of car bodies. Car bodies were on the site from at least 1984 until the date of the Board's viewing of the site on September 20, 1989. There have been some car bodies on the site since at least 1979.

No one showed any public response to the Municipality's invitation to the P.U.B. to have Mr. Schnare clean up his property. The inspectors under the **Salvage Yards Licensing Act** have not done anything to lay any charges against Mr. Schnare in this matter. The Board can only conjecture why this has not occurred if Mr. Schnare is, in fact, in violation of the Act. No official under the **Salvage Yards Licensing Act** appeared or gave evidence before this Board on this appeal.

It is clear from the documents cited, at some time in the past, Mr. Schnare qualified for a salvage yard license. Requirements under that statute have not radically changed since that time. The staff charged with the administration of that statute have had differing views of Mr. Schnare's use of his land. From time to time they differed as to a matter of fact whether or not there was any violation of the statute by Mr. Schnare.

The Board might infer from the **Salvage Yards Licensing Act** officials' failure to commence any prosecution that they are still not sure whether Mr. Schnare is in violation of that statute.

Whether or not Mr. Schnare is in violation of the **Salvage Yards Licensing Act** may depend a great deal on the governing municipal land regulation. It may depend on whether or not he needs a rezoning or equivalent to continue to operate in the way he has. If he does not need a license under the **Salvage Yards Licensing Act**, he may not need the development agreement. He only applied for the rezoning when informed he needed a license. Mr. Schnare stated if he did not need a salvage yard licence, he would not apply for the development agreement.

The Board reviewed this record to show the confusion surrounding Mr. Schnare's use of his land. This confusion apparently supplies Mr. Schnare's motive for applying for a rezoning, and then for a development agreement.

The Board now moves on to its own consideration of the planning issues involved additional to the **Salvage Yards Licensing Act** initiative.

The Board must, when judging whether the decision of Council is reasonably within the intent of the M.P.S., peruse the entire M.P.S. It does so in order to determine the M.P.S.'s intent.

The Board at its 7:00 p.m. session heard from many interested citizens appearing on their own behalf. They all objected to this development on the grounds that the premises were unsightly. The road allowance was too narrow to allow the treatment of car bodies through a crusher. There was inadequate access over the road. There were safety risks to children concerned. The witnesses also worried about the contamination of the wells by liquids draining from the salvage yard.

During the daytime sessions, Ms. Peers called as her witnesses the Appellant, Roy Schnare, Kenneth McCormack, and Harold Jeffrey MacDonald. The Board viewed the site accompanied by counsel and numerous people who were present in the Board hearing room.

The Board has spent time going over the P.U.B. process in this matter under the **Salvage Yards Licensing Act**. This review gives some concept of the time element of governmental involvement. These delays continued almost since the present owner and Appellant, Mr. Schnare, purchased the property in 1979 to the present.

The Board does not propose to go through in such detail the previous planning applications included in Exhibit S-6 and to a lesser extent in S-7. It does not propose to examine in detail even the present application included in Exhibit S-7.

Suffice it to say that, on the documentary evidence, over a long period of years, the Lunenburg District Planning Commission [L.D.P.C.] has continuously been in favour of this project. The L.D.P.C. advises this municipality, and others, on planning matters. The Board assumes, in so being in favour, the L.D.P.C. has made decisions that the various projects proposed, in its opinion, have each been within the intent of the M.P.S.

In respect to the earliest proposal (where a rezoning could have cured the problem), Mr. Schnare said planners advised he wait. They said he should wait until there was a change in

M.P.S. to encompass a development agreement for his property.

The Department of Health, on the various occasions, when asked to comment, has always rejected the proposal. It has stated so on each occasion asked.

The Department of Environment, up until very recently, has been in favour of each of the various proposals. These proposals go back, at least, to the time of the first P.U.B. decision.

The proposals have all been encompassed within 10 acres of land owned (previously described) by Mr. Schnare. The original proposal was for a repair shop and an extensive salvage yard. Negotiation reduced that proposal to one of "no repair shop" and a 200' x 200' salvage yard. This negotiated proposal was in the general area of the compound.

The proposal was put before the Council. The reason given in 1988 for Council's then latest rejection was that the proposal studied in the public hearing was not the proposal that came before Council. It was much reduced.

The proposal Council turned down in 1989 is for a negotiated 100' x 100' salvage yard in the compound area.

The planner is still prepared, on suitable conditions, to recommend a smaller salvage yard in the compound area again.

The Inspector, responsible from the Department of Health and Fitness for making the recommendations from salvage yards in the area, testified. He had been on the site twice.

Mr. Schnare said that he attended on this inspector to ask him again to view the site. The inspector informed Mr. Schnare that he could turn down the project sitting in his desk. The inspector gave a slightly different version of this exchange of views. The Board believes Mr. Schnare's version of this interview.

The nub of the Health Inspector's objection is that the water table in this area is high. It is high under a broken shale soil. The site itself is in close to the brook, previously described. The Inspector made no tests of the quality of the water as it exists in the brook. There, in effect, has been a salvage yard in the area at least since 1984. It existed, perhaps, before 1979. He did not identify any injury done to the property or its surroundings by that salvage yard in all that time.

The Health Inspector, of course, has no idea whether the brook is already contaminated even without this proposal coming into fruition.

The Department of the Environment has been taking the attitude that the land is subject to a treatment minimizing environmental pollution. It reports, by the nature of the land itself, oil will not percolate down below the high water table. Waste oil therefore will not pollute any drilled wells that may be down stream of the compound. Environment agrees there is some risk of polluting the stream and possibly, through pollution of the stream, polluting some dug wells. The Department of the Environment has found no specific known environmental injuries.

It has made no tests to show that such pollution may occur.

Mr. Schnare said another arm of the brook, or another brook leading into this brook, starts at the Rafuse Salvage Yard. He said no one controlled that yard to protect the environment against the Rafuse Salvage Yard. Mr. Schnare said Mr. Rafuse's successful application to rezone basically started at the same time as Mr. Schnare's application. Mr. Rafuse had no problems with his rezoning.

Council held no public hearing on this appealed application to enter a development agreement. Council on this application took note of the protests made at the previous public hearing.

The Board looks therefore to the previous public hearing on the similar previous application to see what occurred during that hearing. All citizens who appeared in this matter before the Board appeared also against the proposal in the previous Council hearing. They all disapproved of the proposal for a development agreement.

The Minutes of the Meeting of Municipal Council of Wednesday, June 8, 1988, appear on page 136 of Exhibit S-6. The Minutes indicate what happened at the public hearing. At page 135 there is a comment after recitation of the opposition remarks:

> "Subsequently the group of residents stood, and as a body, said that they disagreed with the proposal. This was done in unison by those present."

One of the witnesses before the Board spoke of shouting at the

Council at this hearing. At the public hearing of June 19, 1988, public opposition to this project was loud and clear to the responsible politicians.

If, in this appeal, the Board orders Council to negotiate a development agreement, Council would negotiate some scheme with Mr. Schnare. Following a development agreement here, it seems likely the Development Officer would have to grant a development permit within the context of the L.U.B. The Board believes this development permit is necessary to allow for the works Mr. Schnare would perform to establish his salvage yard use.

The Board specifically refers to PART 2 of the L.U.B.:

> "2.3 Requirement for Development Permit
>
> No developer shall undertake, or cause or permit to be undertaken, any development in the area to which this Land Use By-law applies unless a Development Permit has been obtained in relation to such development from the Development Officer."

The Board refers also to Section 9.6 of the Implementation Policies of the M.P.S.:

> "...Council shall have regard to the following matters:
>
> a) that the proposal is in conformance with the intent of this Planning Strategy and with the requirements of all other Municipal By-laws and regulations;"

For this proposal to proceed under a development agreement, there must be a development permit granted.

This land faces on, and will be serviced through, an existing public right-of-way as opposed to a street. The

M.P.S. (Map 4) lists the type of "street" the public right-of-way is. It is an "undeveloped public right-of-way". There is a notation on that map: "quotation 2 - the undeveloped public rights-of-way shown on this plan are based on the Plan of Chester Town shewing (sic) roads and centre line of streets surveyed by John A. Mcallum, Surveyor and dated 13th July, 1903."

In the L.U.B., under the General Provisions for All Zones, page 8, item 4.11 one finds the following:

> "Frontage on Street
>
> No development permit shall be issued unless the lot or parcel of land intended to be used...
>
> a) abuts and fronts upon a street; or
>
> b) has access to a street by means of a right-of-way of no less than 6 metres (19.6 feet) in width in which case the frontage requirement shall be waived; or...
>
> d) was in existence on or before 25 March, 1976....

The arrangement of the boundaries of Mr. Schnare's three lots by resubdivision must occur to accommodate the various uses now described on the land. This subdivision must occur before the proposal can happen. Since it has not, the lot subject to the proposed development agreement was not "in existence before 25 March, 1976".

The evidence is clear the subject land does not abut a street. To receive a development permit, the land must abut a private right-of-way no less than 6 metres (19.6 feet) wide.

A great deal of time, evidence, and comments by the inhabitants touched upon the width of the particular right-of-way.

The Appellant, Mr. Schnare, said he had a survey plan showing the right-of-way was 15 feet wide. The Board finds on the evidence before it that the roadway is not wider than 15 feet. This is the best case for the Appellant on this particular appeal. On this private right-of-way, the development officer cannot grant any development permit to Mr. Schnare should the Board approve the proposal. The right-of-way is too narrow by at least 4.6 feet. The M.P.S. requires any development agreement to conform with the L.U.B. Even if the Board allowed the appeal and ordered the Council to negotiate a development agreement, the development officer could not allow the proposed development. He could issue no development permit to permit the salvage yard. The lot does not front on a private right-of-way at least 6 metres in width.

It therefore appears futile to the Board to try to order that Council negotiate a development agreement in this appeal. The development officer could not issue a development permit for the construction and use required.

Many other lots, and all new lots, situate on this private right-of-way might be in the same position.

The planner did not bring this particular aspect of the matter to Council's attention. He misinterpreted this part of the L.U.B., or the Board did.

If the Board is right in its interpretation, then the

Appellant's application violates policy 9.6(1) of the M.P.S. since all provisions of the L.U.B. specifically 4.11(b) cannot be met.

The rest of the planner's evidence is careful and measured. His reports to Council are in good condition, accurately setting out all the checklist that Council had to check. On the possibility that the Board might be wrong, the Board finds, in any event, that current access for vehicular traffic in and out of this area is inadequate for the demand to be put upon it by the proposed salvage yard.

The Board therefore believes that under Section 9.6(b) of the M.P.S. the Appeal fails. As well, the proposal is premature, and inappropriate by reason of the inadequacy of street networks, in, adjacent to or leading towards the development regarding traffic hazards.

Thus the decision of Council is reasonably consistent with the intent of the M.P.S.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of November, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

VAUGHNE REALTY LTD. LTEE. v. TOWN OF YARMOUTH

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-1 TO R-2 TO PERMIT 4-UNIT TOWNHOUSE - MINOR VARIANCE - PLANNING ACT S. 59(3), 76(7), 79, 80 - MUNICIPAL BOARD ACT S. 25(1) - TOWN OF YARMOUTH L.U.B. S. 4.5, 5.16, 5.17.

V.R. Ltd. appealed Council's decision refusing to rezone vacant lot from R-1 to R-2 for a 4-unit townhouse. An earlier rezoning application to permit an 8-unit building on the property had been withdrawn. A minor variance is required to permit the proposed building. There had been a court case between the Town and the Appellant respecting a by-law violation.

HELD: Appeal dismissed.

Council had a right to regard the application without any presumption of trust. A developer's prior legitimate political activity is not a proper matter of consideration on a rezoning application. The Town proved a drainage problem exists on the lot. The Board should judge Council's decision in light of the proposal before Council. The Board does not have the power to decide what is a "minor" variance and whether it should be granted. The proposal that was properly before Council was for a specific building which required a minor variance. Council was entitled to decide that it would not authorize a proposal which could not be built as-of-right. Council's decision reasonably carried out the intent of the M.P.S.

NSMB-27-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **VAUGHNE REALTY LTD. LTEE.**, a body corporate, from a decision of the Council of the **TOWN OF YARMOUTH** made on August 10, 1989, refusing to permit the rezoning of property on Hibernia Street, Yarmouth from R-1 to R-2 to permit an 8-storey apartment building.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RAYMOND NELSON, Agent for **Vaughne Realty Ltd. Ltee.**, Appellant and Applicant Developer before Council,

GREGORY M. WARNER, Q.C., on behalf of the Respondent, **Town of Yarmouth.**

HEARING DATE: October 23, 1989.

BRIEFS SUBMITTED: Last Memorandum Delivered: November 6, 1989.

DATE OF INSPECTION OF SITE: October 23, 1989.

DECISION RENDERED: December 18, 1989.

DECISION: Appeal Dismissed.

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, c. 9. It is an appeal from the refusal decision of the Council of the Town of Yarmouth made on August 10, 1989. Council refused the Appellant's application to rezone a lot on Hibernia Street, Yarmouth.

The Appellant, obviously dissatisfied with this decision of Town Council, appealed Council's decision to the Board.

The Appellant wanted its north side of Hibernia Street lot rezoned from R-1 (Low Density Residential Zone) to R-2 (Medium Density Residential Zone). The Appellant proposed to construct on the lot a four-unit townhouse (double duplex). At the same time it applied for rezoning it applied for a minor variance to reduce the side yard requirements. Simultaneously, it applied for a development permit to build a specific townhouse on the lot.

The lot in question is vacant. As of right, the Appellant could install a duplex on that lot. If rezoned and if the land were suitable for the development there is enough lot area to sustain an 8-unit apartment house as-of-right.

The Appellant's Notice of Appeal, dated August 15, 1989, arrived at the Board on August 16, 1989. An undertaking to pay costs accompanied the Notice of Appeal.

Under Section 16(1) of the **Municipal Board Act**, 1981, c. 9, the Chairman assigned Board Member, Richard L. Weldon to hear the appeal.

The Board heard the appeal agreeably to its Notice of Hearing at its October 23, 1989 sittings. These sittings occurred at the Shelburne Room, Rodd's Grand Hotel, Yarmouth.

The Board had originally set the Yarmouth Court House as the site of the hearing. The Clerk changed this site during the advertisement period. The Clerk contacted the Town Clerk. She had him place a notice on the Council Chambers directing any persons who attended there to attend at the Shelburne Room, Rodd's Grand Hotel. The final newspaper advertisement ordered by the Board contained the amended Notice of Hearing for the Shelburne Room (See Exhibit V-18).

Thus there was one correct advertisement of the actual place of the sittings and, perhaps, two incorrect advertisements.

Section 25(1) of the **Municipal Board Act**, requires that notice of any hearing shall be given by advertisement for three consecutive weekly insertions preceding the date of the hearing **unless otherwise ordered by the Board.** The Board moved its hearing place to accommodate the presence of a planning technician class from the Community College. As a consequence, and to adapt to this known public demand, the Clerk changed the site. She changed the advertisement and changed the Notice of Hearing circulated in the neighbourhood. The Board **otherwise orders** that one correct newspaper insertion, in this factual situation, is adequate notice within Section 25(1) of the **Municipal Board Act.**

Both parties active before the Board consented to this order and consented to the jurisdiction of the Board.

The Board has reviewed the documents and finds it has jurisdiction to hear this appeal on its merits.

The subject lot is an almost rectangular lot, the narrow end of the rectangle facing on the north side of Hibernia Street. On the west side of the lot lies the Dominion Atlantic Railway right-of-way which contains a still-active rail line. Directly on the lot's north boundary (or slightly in its north boundary) is a drainage slough draining from west to east. This slough arrives at, and drains through, a granite culvert under the Dominion Atlantic Railway Right-of-way. On the lot's east boundary lie occupied residential lots and one lot where someone now is constructing R-1 housing. These residential lots abut the east side of Brunswick Street.

The lot lies within the residential designation on the Generalized Future Land Use Map (G.FLUM). The G.FLUM, contained in Exhibit V-16, the Municipal Planning Strategy (M.P.S.) of the Town of Yarmouth forms a part of the M.P.S. Hibernia Street is a "local street" under the street classification map shown in V-16. Brunswick Street, mentioned above, is a collector street under the same classification. The subject property is serviced by sewer and water. See Map 3 of Exhibit V-16. Map 4 (the existing Land Use Map) accurately describes the lot as being vacant. Under the Yarmouth Land Use By-law, (L.U.B.), Exhibit V-17, Zoning Map Schedule "A", the subject lot shows as Low Density Residential (R-1) Zone.

According to Exhibit V-27, the lot has a front boundary on Hibernia Street of 80.88 feet. Its north boundary is 89.12 feet. Its east boundary is 92.34 feet. Its west boundary is

192.72 feet. The lot has a roughly rectangular dimension of 80' x 192'. If the lot were a true rectangle it would be approximately 82 x 192. The lot contains roughly 16,000 or 17,000 square feet. The lot is low-lying. It slopes gradually from southeast to south to northwest.

On the Board's view of the site (and as described in the evidence), someone has recently installed fill towards the lot's front. There is a diagonal slough starting at about mid-line in the property and running in a northwesterly direction. This slough appears deepest and most clearly defined at its eastern end. It spreads out to non-existence in a swamp-like area in its most western end. The open drain that goes east to west across the back end of the property is deep and distinct. The open drain (slough) ends in a culvert under the D.A.R. roadbed. On October 23, 1989, there was some water in the bottom of this open drain.

Exhibit V-7 shows an existing drainage slough along the eastern boundary until it meets the intermediate slough going diagonally across the property from the centre line diagonally backwards.

The Appeal Record, Exhibit V-14, shows that on June 14, 1989, (page 1), the Applicant/Appellant applied to rezone the lot from R-1 to R-2. The Appellant proposed to construct two two-unit joint-dwellings. In a letter of the same date, it applied to reduce the side yard requirements on each side, 1.2 feet on each side to bring it down to 13.8 feet. On an undated application (but apparently on the same date) the Applicant applied for a development permit to construct a double duplex. The Appeal Record, Exhibit V-27, previously mentioned, shows the proposed double duplex.

On July 6, 1989, P.A.C. met to consider this particular rezoning application. At page 8 of the record, the Minutes disposed of this application as follows:

> "Vaughne Realty Limited - north side Hibernia Street
>
> An application has been received from Vaughne Realty Ltd. requesting rezoning of lands, north side of Hibernia Street from R1 to R2 to permit the construction of a double duplex (4 units).
>
> **A rezoning application for the same property was refused last December. (8 units).**
>
> It was moved by John Clulee, seconded by Councillor MacLeod, and carried that this application be tabled and that the developer be requested to appear before the Committee with more information. [emphasis that of the Board].

Richard Mills the Town's Planner conveyed the thoughts of this Committee to the Applicant by letter of July 7, 1989. In part he said:

> "Several months ago an application for the same rezoning was brought before the Planning Advisory Committee to **erect an eight (8) unit dwelling** on the same lands. The Planning Advisory Committee was concerned at that time with potential drainage problems, the character of the development in relation to the existing dwelling units, access to and from the site, location in proximity to the railway and brook and traffic. It was asked then, for you to re-submit another application and to appear before the Committee to show solutions to these concerns. It is my understanding that the application was withdrawn at that time.
>
> The Planning Advisory Committee have again expressed

> the same concerns about this new application and have subsequently turned it down. Until such time as a presentation is made to the Planning Advisory Committee outlining in detail your exact intentions regarding the property and design solutions, your application will not be processed further. [emphasis that of the Board].

In a letter of August 1, 1989, the Applicant/Appellant replied to Mr. Mills' letter:

> "...the following are the particulars of the project we intend to build.
>
> 1. Landscaping The lot will be completely filled to an area of at least 90 feet from the street line. The existing shrubbery on the front of the lot and west side, will be retained and the rest of the area will be landscaped, graded and seeded with the exception of the driveway and parking area. The northern half of the lot will be left as a natural green area to provide for proper drainage already in place.
>
> 2. The structure will be constructed of quality materials, built to national building code specifications or better, and the exterior will be finished in vinyl siding and brick. The true lot coverage for the building will be 54 x 32 with a retaining wall on the northern side of the building a distance of six feet from the building.
>
> 3. The height of the building will not exceed 25 feet from the ground to the peak.
>
> 4. There will be no open storage space.
>
> Attached please find a site plan and a picture of an identical building we intend to build...."

Page 12 is a drawing and contains this writing:

> "This area (102 x 89) will be left as natural green area and existing drainage maintained."

The proposal allowed for 100 square foot of parking in the rear of the proposed building. It allowed a 12 foot driveway on the east boundary of the lot. Mr. Mills made a report to the Planning Advisory Committee (P.A.C.) dated August 8, 1989 on this application to rezone. The text of this begins on page 14. Part of the text is as follows:

> "Existing Land Use
>
> The subject property is currently vacant. The surrounding area consists of single family and two family dwelling units. A thirty (30) unit senior citizens residence is located on the south side of Herbert Street east of the subject property. The subject property is bounded on the west by the Dominion Atlantic Railway right-of-way and on the north by residential properties which front on Brunswick Street.
>
> Relevant Municipal Planning Strategy Policy
>
> The following Municipal Planning Strategy policies have been identified as being relevant to the proposed rezoning:
>
> 1.13 It shall be the intention of Council to consider proposals for Medium Density Residential Development (R-2 uses) on lands designated Residential and zoned Low Density Residential R-1 by amendment to the Land Use By-law and subject to the following:
>
> 1. that the lot meets the minimum lot frontage and lot area requirements for the proposed use as identified in the Land use By-law;
>
> 2. conformity with criteria contained in implementation Policy 6.8.
>
> 6.8 It shall be the intention of Council in considering amendments to the Land Use By-law, in addition to all other criteria as set out in various policies of this Municipal Planning Strategy, to have regard to the following matters:
>
> A. That the proposal is in conformance with the intents of this strategy;
>
> B. That the proposal is not premature or inappropriate by reason of...
>
> i. the financial capability of the Town to absorb any costs relating to the development;

ii. the adequacy of sewer and water services to support the proposed development;

iii. the adequacy and proximity of schools, recreation and other community facilities;

iv. the adequacy of road networks in, adjacent to, or leading to the development;

v. the potential for contamination of watercourses or the creation of erosion or sedimentation;

vi. the potential for damage to or destruction of historical buildings and sites.

C. That adequate requirements are contained in the Land Use By-law to reduce conflict between the development and any other adjacent or nearby use by reason of:

i. type of use;

ii. height, bulk and lot coverage of the proposed building;

iii. traffic generation, access to and egress from the site and parking;

...

vi. provision is made from buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic;

vii. development is located so as not to obstruct any natural drainage channels or watercourses;

viii.similar matters of planning concern.

D. Suitability and development costs of the proposed site in terms of steepness of grades, soil and geological conditions, marshes, swamps or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors.

Planning Considerations

Residential Policy 1.13 and Implementation Policy 6.8 will form the basis for the evaluation of the subject property.

...Residential Policy 1.13(1) is satisfied. Part 9.1 of the Land Use By-law allows as a permitted use double duplex buildings and 9.2 requires the minimum lot frontage to be 80 feet with a minimum lot area of 8,000 square feet for the first four units and 1,000 square feet for each additional unit. Although the application is for a four-unit "double duplex" dwelling unit, the size of the property would allow up to eight (8) units to be constructed in the R-2 Zone.

The subject property is presently serviced with both sewer and water satisfying Implementation Policy 6.8(BII). The subject property is in close proximity to adequate school, recreation and open space areas satisfying 6.8(BIII)...the increase in traffic from the proposed development would be minimal...The proposed development is bounded on the west by the D.A.R. level crossing. Access to the lot will have to be regulated so as to keep the entrance/exit to the development as far away from the level crossing as possible.

There is an existing drainage swale, which drains the north side of Hibernia Street, located on the property, and is channelled along the western boundary. The store [storm?] drainage swale will have to be accomodated should the site preparation alter the existing grade. Due to the height of the site in relation to the adjacent property, the site preparation will have to include changing the existing contours. The applicant has agreed to maintain the existing swale and upgrade it, per Street and Water Superintendent's specifications, if deemed necessary.

[page 16]

...storage, landscaping or building form or exterior finish is compatible with adjacent developments pursuant to Implementation Policy 6.8(c). As mentioned earlier, consideration should be given to the proximity of any potential lot access to the existing level crossing on the west.

The site plan submitted shows the lot access to be located on the eastern side of the proposed development. According to the site plan, the maximum width of the driveway is 13.8 feet. According to Section 5.17(6) of the Land Use By-law, the minimum width of a driveway for two-way traffic shall be twenty

(20) feet. Therefore, the proposed development does not meet this requirement. Access to and from the site would have to be located on the east and west of the buildings. The driveway on the west would then be located adjacent to the D.A.R. right-of-way. Other than the consideration of the proximity of the subject property to the D.A.R. level crossing, Implementation Policy 6.8(D) would appear to be satisfied.

Recommendation

In light of the above considerations, it could be concluded that the proposed rezoning is generally in conformance with the Municipal Planning Strategy and Land Use By-law except for the following:

- The Town would have to grant the applicant a minor variance for both side yards of the proposed development. Section 9.2 of the Land Use By-law requires a minimum side yard set back of fifteen (15) feet, the site plan submitted shows the side yard set back to be 13.8 feet.

- Section 5.16 of the Land use By-law states that no access shall be located on a local street within fifty (50) feet of the limits of the rights-of-way at an intersection. The question here is should the D.A.R. level crossing be considered an intersection?

Although the applicant wishes to rezone the subject property for the construction of a "double duplex" dwelling unit, once rezoned, there is nothing stopping a developer to construct **up to eight units on the subject property at a later date, providing all the applicable By-laws are met.** Even though the applicants intentions are sincere, the Town does not have full control over the property once resold [rezoned?]. It is my opinion, that, although the application meets (generally) the requirements of the Municipal Planning Strategy, the potential for **an eight unit apartment building** on the site does not conform with the surrounding land uses and the general intent of the Municipal Planning Strategy. Furthermore, I feel the potential **for an eight (8) unit apartment building** is far too close to a level crossing especially when one considers safety re children.

My recommendation is as follows:

That the lands owned by Vaughne Realty Ltd. Ltee. not be rezoned from Low Density Residential (R-1) to Medium

Density Residential (R-2) for the purposes of constructing a four unit "double duplex" dwelling unit.

Mr. Charles Jess of the Street & Water Department of Yarmouth in a letter to Rick Mills, dated August 1, 1989, had this to say about the proposed development:

> "1. The land on this lot and on the next lot east slope westword [sic] toward the railway but both lots are low with reference to Hibernia Street. Thus, it is imperitive [sic] that filling of the lot to street level not continue from the front of the lot to the back (north), thus constructing a dam and creating a pond in the easterly neighbors back yard.
>
> 2. At the same time, I must point out that the sewer in Hibernia Street is at a depth unknown by me, at the front of the lot. I would recommend that prior to any construction, the developer lay his services to his property line and then design his building to a known sewer elevation.
>
> 3. I would urge a word of caution about placing anything of value in the back yard area at an elevation lower than the railroad tracks, since in the event the culvert under the tracks became jammed or plugged, severe flooding could occur. I realize this could be called an act of God, but lets not push our luck. The same, to some extent, could apply if the ditch on the property to the north became plugged. It has in excess of one square mile of drainage area.
>
> In summary, the lot could be useful if the southern half wer [sic] brought to street grade, but until the neighbours to the east build their whole lots to higher elevation, it would not be practical to extend beyond that...".

The Minutes on page 21 of Exhibit V-4 show another P.A.C. meeting, attended by the principals of the Applicant-Developer, occurred on August 8, 1989. These Minutes say:

> "Planner Richard Mills stated the proposed rezoning is generally in conformance with the Municipal Planning Strategy and Land Use By-law except for the following:

> 1. a minor variance for both side yards would be required as a minimum side yard set back is [sic] 15 feet.
>
> 2. No access shall be located on a local street within 50 feet of the limits of the right-of-way at an intersection and is the D.A.R. level crossing an intersection.
>
> If the property is rezoned to R-2, there is nothing stopping a developer to construct up to 8 units at a later date providing all applicable by-laws are met and such a building would not conform with the surrounding land uses.
>
> The Planner recommends that the land in question not be rezoned from R-1 (Low Density Residential) to R-2 (Medium Density Residential) for the purposes of constructing a four-unit double duplex dwelling unit.
>
> Both Mr. Nelson and Mr. LeBlanc stated it was their intention to build a 4 unit apartment building only and would be willing to convey to the Town enough land so that nothing else would be built on this property. It is there [sic] intention to build a large split entry house similar to the one just built on Cottage Street.
>
> Discussion followed as to whether a multi-unit building should be in a R-1 area; is it in the interest of proper planning and in the interest of the citizens of the area.
>
> [page 22]
>
> It was moved by Mayor Crosby, seconded by Councillor MacLeod, and carried that the Planning Advisory Committee **take the recommendation of the Planner and not rezone** the lands in question from R-1 to R-2. Mr. Rod Rose voted "nay"."

Town Council discussed this rezoning on August 10, 1989. The Minutes for this meeting start at page 25 of Exhibit V-4. Voting members attending Council were Mayor Crosby, Deputy-Mayor Eldridge, Councillors Hood, Langille, MacLeod, Mosley and Stockman. At page 30 of the Exhibit those Minutes it reads:

> "It was moved by Councillor Hood, seconded by Councillor MacLeod, and carried that as recommended by the Planning Advisory Committee that the application of Vaughne Realty for the rezoning of lands on the north side of Hibernia Street, east of D.A.R. tracks from R1 to R2 to construct a four unit apartment building be denied. Councillors Stockman and Langille voted "nay"."

The Town Clerk wrote to the Applicant, Vaughne Realty Ltd. Ltee., and told it of the refusal. The letter told the applicant of its right to appeal the Council decision to the Nova Scotia Municipal Board. The Applicant, thus notified, appealed.

The Appellant called Ray Nelson, its President, and Councillors Rod Rose and Jim Stockman. Before the Appellant had finished calling its evidence, at the Town's request, Councillor Hood gave his evidence out of conventional order. The Appellant then resumed and called Richard LeBlanc, another principal of the Appellant.

Mr. Nick Kenney, a next door neighbour of the property, gave evidence on his own behalf. He testified according to the provisions of Section 27(3) of the **Municipal Board Act**.

In addition to Councillor Hood, Mr. Warner, for the Town, called Richard Wayne Mills the Town's Planning and Development Officer. There was no rebuttal evidence. Mr. Mills was the final witness before the Board.

The only dispute on the facts (as previously summarized) concerns the site. The Town Planner said that fill installed on the subject property by the Appellants plugged up the drainage running north along the east boundary of the subject lot. This blocked the drain running from Hibernia Street to the lot's centre slough. The Developer said that this drainage was not plugged. The Planner said it was. A view of the site did not make the Board any wiser. The Board feels if anyone plugged the ditch, and if it is an existing drainage allowance, re-excavation will easily restore it.

The Development Officer said that he had no right to refuse the duplex building application for this lot evidenced on Exhibit V-27. He therefore granted the development permit for the duplex on the lot.

The Board notes that both proposals, Exhibits V-27 and V-28, mention that existing drainage "is to be maintained".

The planner, said that the Developer put fill on the property without a development permit.

On May 25, 1989, (Exhibit V-27), the Appellant applied for an as-of-right development permit to build a duplex on the lot. It received that permit. The Appellant contends that development permit is still in effect. The Planner says that it is not. The Appellant contended it put in the fill pursuant to that development permit.

The L.U.B. 5.1A contains a requirement for a development permit.

L.U.B. Section 5.19(a) deals with alterations of land in excess of 20 cubic yards of material:

> "...the level of land resulting from the excavation or filling activity, for purposes of the preparation of land for development or in conjunction with any permitted development which involves more than 20 cubic

> yards of material shall not be undertaken without a development permit.
>
> d) No alteration in the level of land resulting from any excavation or filling activities for which a development permit is required shall deliberately cause any water to be retained on the site or be shed to an adjacent property."

4.5 EXPIRATION OF DEVELOPMENT PERMIT

> "Any development permit issued shall expire six (6) months from the date of issue of such permit **should no development begin within the aforementioned time period...**"

Under the L.U.B., that the development permit issued pursuant to the application mentioned in Exhibit V-27, validly issued, has not expired. Some development has begun. There has been no revocation given by the development officer to the developer. The developer has not, on its own, expressly abandoned the development permit granted. The developer has done some work under the permit within six months of May. The developer placed the fill complained of prior to October 26, 1989.

Once a rezoning application is made, the Planner, Mr. Mills, feels that the **Planning Act**, cancels the previously issued development permit.

The Board notes that Section 59(3) of the **Planning Act** keeps the amendment of the L.U.B. from coming into force until either"

1) the time for appeal has elapsed, or

2) all appeals have run their course, and

3) the Board has affirmed Council's decision.

Section 59(3) would clearly govern this particular situation had the Council granted the rezoning. This statutory stay would only operate had the rezoning amendment from R-1 to R-2 passed.

The Board also refers to Section 76(7) of the **Planning Act**:

> "No municipal development permit that is or may be inconsistent with a proposed land-use by-law, or any proposed amendment or revisions thereof, shall be issued for a period of one hundred and twenty-days from the publication of the first notice, advertising the intention to adopt or amend."

This section only deals with the granting of a municipal development permit. It does not deal with a development permit already granted.

The Board sees no express support either in the L.U.B. or the **Planning Act** for any revocation of the existing development permit. The factual situation (the application of fill on the lot) is not necessarily an indication that the developer was acting in bad faith. At least not bad faith in the sense it was acting contrary to any planning regulations.

The Appellant is clearly now taking a technical approach that it has a valid outstanding development agreement to build a duplex dwelling. It maintains this position even though its expressed intention is not to build that building. Its present intention is to build the double duplex shown in a subsequent application. This practice might be, arguably, sharp. It does not appear to be contrary either to the L.U.B. or the **Planning Act**. Of course, the L.U.B. prohibits two main buildings on the same lot. At one time or another the Appellant will have to select which building it is going to proceed with.

L.U.B. Section 9.2 contains the parking requirements for the R-2 Zone. The particular requirement falls under the phrase "all other construction". The L.U.B. requires one and one-half units of parking space per dwelling unit for a total of six parking spaces.

L.U.B. **Part 5 General Provisions for All Zones** sets parking standards.

5.17 STANDARDS FOR PARKING AREAS

> "Where parking facilities for more than four (4) vehicles are required or permitted by this By-law, the following standards shall apply:
>
> ...
>
> 6. The width of a driveway leading to a parking area, or of a driveway or aisle in the parking area, shall be a minimum width of ten (10) feet if for one-way traffic and a minimum width of twenty (20) feet for two-way traffic;
>
> 7. The minimum separation distance between driveways shall be forty (40) feet."

Part 26 definitions, definition 49 defines parking area:

> ""Parking Area" means an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, employees, customers or residents and which has adjacent access or permits ingress or egress of motor vehicles to a street or highway by means of driveways, aisles or maneuvering areas where no parking or storage of motor vehicles is

permitted.

> 50. "Parking Space" means an area of not less than one hundred and sixty (160) square feet, measuring eighteen (18) feet by twenty (20) feet exclusive of driveways or aisles, for the temporary parking or storage of motor vehicles, and which has adequate access to permit ingress and egress of a motor vehicle to and from a street or highway by means of driveways, aisles or maneuvering areas."

The Planner has alleged that this definition of "parking space" means 200 feet or 10 x 20 for each parking space. He says he learned that principle from the last preceding planner. That would amount to 200 square feet for each parking lot. It would demonstrate a gross need in this property, at least, exclusive of driveways or aisles for 1200 sq. feet of parking spaces.

The L.U.B. sets out 18' x 20' feet for the dimensions of a parking space. The Board calculates the square footage land use necessary to accommodate six parking spaces at 2160 square feet required for parking spaces each being 18' x 20' or 360 sq. feet per lot. This particular piece of legislation is obviously incorrect in some respect. 8' x 20' would make each parking space 160 square feet as also set out in the L.U.B.

The Board looked at the purpose of a "parking space". Parking space exists to park an ordinary motor vehicle, and to allow people to get in and out of the motor vehicle after they park it.

The Motor Vehicle Act, R.S.N.S. 1967, c. 191, as amended, defines the "**maximum width**" of a vehicle in Section 171"

> "...no vehicle including any load thereon, shall exceed a total outside width of 2.6 metres."

2.6 metres as the Board calculates it is approximately 102.362 inches. 8 feet, as the Board understands it, represents 96 inches. The Board then looked at the **Motor Vehicle Act** in its original form as revised in 1967 and Section 170(1) then described the maximum width of vehicles as follows:

> "No vehicle shall exceed a total outside width, including any load thereon, of 8 feet..."

The Board therefore notes that the pre-metric conversion of the maximum width of cars in Nova Scotia was 96 inches. Except for imprecise metric conversion, the **Motor Vehicle Act** has maintained the same approximate maximum width for cars. The Board takes note and decides as a fact that the ordinary width of motor cars since 1967 has not increased. The Board thinks it more than likely cars have decreased in size since 1967 because of the energy crisis.

If, in the L.U.B., it said 8 x 12 feet then the square footage which was the initial calculation in the definition of the L.U.B. for "Parking Space" was correct. The L.U.B. should read 8 feet x 20 for 160 square feet. The Board interprets that this is the way the Council intended the L.U.B. to read. The Board therefore decides that the L.U.B. requirement for parking space is 160 square feet in a configuration of 8 ft. x 20 ft. The total square footage requirement of parking spaces in this case would then be 960 square feet minimum. Each space would be at least 8 feet x 20 feet. There is no acceptable support in the L.U.B. for 10 foot by 20 (200 square feet) foot per parking space advocated by the Town Planner, Mr. Mills.

The Appellant's evidence directed itself heavily towards its undertaking it only proposed to build four units of a specific design. [The Developer did concede, after rezoning, it could build 8 units on the lot, as-of-right.] The Developer said that it would secure this intent by virtue of a restrictive covenant put on the land. Failing a covenant, the Developer would convey to the Town a portion of the lot. The security, if effective, would ensure the Developer only built four units on the residuary land.

The Town Solicitor and the Planner both adopted the position that the Town had no authority to allow the proposed subdivision of the lot. The new lot for the Town had no frontage on a Town Street. No one pursued the position of the deeding of the unfronted lot as an addition to a neighbouring lot. This would reduce the residuary lot sufficiently to prevent 8 unit construction. The newly amalgamated lot would face on a street.

The area that is "waste" to the developer could be of use to the Town. It either borders upon or encompasses low lying lands which may flood. These low lands may certainly need possible clearance of brooks and other flood control measures. The Town Water Superintendent feels the Developer should fill the rear of the lot to the D.A.R. roadbed level. This level is considerably higher than the general lie of the land of the lot.

The Board accepts that the Town, since it has no adjacent land, cannot allow the subdivision approvals. On subdivision one of the lots, as approved, would have no street front. The Town solicitor argued that the Town could not accept the restrictive covenants proposed. Even if the restrictive covenant were possible, the Town would have to enter a mutual contractual relationship with the Developer. The Town need not enter into such a contractual relationship since such relationship would be purely voluntary. The Town may not want to enter such a relationship for policy reasons that are of no legitimate concern of this Board.

These expressions by the developer's principals clearly show the expressed intent of the developer. It intends to develop a certain specific scheme amounting to 4 units in gross on the subject property. Its proposal was much more specific. It gave a photographic scheme of an actual building, identical, (already built) on another town lot. The Developer proposed building identically to that.

To build so, with the front of the building facing the street, would require, at least, the minor variance requested. There is no dispute on that. The Appellant sought the minor variance in its concurrent application. The normal side yard requirements are clearly fifteen feet on each side. This building on this lot would encroach on the side yards.

The Development Officer wanted the Developer's driveway out of the way of the level crossing of the D.A.R. railway over Hibernia Street. This level crossing is on, or close to, the west boundary of the lot.

In its proposal before the Board, the Appellant put the parking in the rear of the proposed building. The Appellant suggested a single driveway of a maximum width of 13.8 feet along the east boundary of the lot. The neighbour's adjacent driveway is on the west side of his lot. Thus the two driveways would be either adjacent to or very close to each other.

For the number of parking spaces the L.U.B. required 2 exits of 10 foot each. The L.U.B. allowed, alternatively for a combined exit of 20 feet. In an 80 foot frontage there is obviously a sixty-foot surplus above these two requirements.

The Planner said that the specific proposal put to him does not allow the driveway prescribed. He put this proposal to Council. The Appellant's answer to this is that it was willing to accommodate changed requirements. It could install circular driveways. It could change the exit and entrance. It could increase the exit and entrance to 20 feet. It could use various other schemes to accommodate the driveway requirements. The Appellant felt these things were elastic and capable of adjustment at the development permit approval time.

The Appellant indicated it was willing to move its building back further on the lot. It would then bring its parking in front. The Appellant indicated this would not be as aesthetically pleasing to its prospective customers. The

Planner insisted that such a development would require filling in of the eastern existing drainage ditch. That is the ditch which runs north from Hibernia Street roughly half way back on the lot. The Planner says that fill blocks this ditch now. The Board wonders why neither party contemplated crocking this drainage with proper enlarged storm drain crock. That would allow dual use of the area both for drainage, and as a driveway.

The Appellant indicated Council could apply the same reasoning to the diagonal open drainage ditch running across the lot almost to the D.A.R. culvert.

The Board is uncertain whether filled drainage fits in the regulatory scheme of the Town of Yarmouth. No one brought the Building By-law, if there is one, into evidence. A parking lot is much more easily placed on a filled drained area than a building. The Board also agrees that parking for six cars would probably be aesthetically better situate in the rear of the building. That allows lawns, circular driveways or whatever else looks nice in front of the proposed building. The Appellant was even more elastic. It indicated it could run a 10-foot driveway in the 13.8 feet on either side of the building and therefore get the necessary square footage.

No one but the Board to date has sat down to calculate the 8 ft. x 20 ft. L.U.B. requirement for each parking space. No one has calculated all additional areas in accordance with the L.U.B. and fitted them to the lot. Suffice it to say, for the purposes of this appeal, there is enough square footage on this lot. This square footage can accommodate two separate driveways leading past the proposed building on either side. There is room in the front footage to accommodate a combined 20-foot exit or two ten foot exits. The developer could meet the parking requirements, in detail, at the development permit stage. Parking, surely, is not such a difficult thing to accommodate on the available street frontage and available lot area.

Much more difficult is the placing of a building in a wet and low lot.

Counsel for the Town made (in his cross-examination of Mr. LeBlanc) a heavy attack of the Appellant's past conduct towards the Town. Counsel attacked the Appellant's attitude in relation to the planning regulations in force from time to time in the Town of Yarmouth.

Counsel referred to the Town of Yarmouth v. Vaughne Realty Ltee. Ltd. (1987) S.Y. No. 160 reported in (1988) 88 N.S.R. (2D.) 48. This was a decision of Glube C.J.T.D. dated November 24, 1988. In that case the Town had taken to the Supreme Court Trial Division the present Appellant. The case concerned a business then operated by the present Appellant. The Town was seeking relief under Section 108 of the **Planning Act**. The Town based its action on the Appellant's contraventions of the then existing By-law. It concerned specifically in this case the use of an office as a real estate office in a prohibited zone. At page 22 [as found in the filed decision], Glube, C.J.T.D. said:

> "I find the Plaintiff has satisfied the burden of proof and satisfied me they are entitled to an Order under Section 108 of the **Planning Act**. I am prepared to grant an Order restraining the continuance of the operation of the real estate brokerage business and general industrial M-1 Zone by Vaughne at 179 Pleasant Street, Yarmouth. The actions of Vaughne are contrary to the Land Use By-law of Yarmouth."

The Board concludes, from representations of counsel and on admissions on cross-examination that this decision was embodied in an Order. The Board concluded the defendant Vaughne Realty Ltd. received the Glube Order.

Within six months of this present hearing, the Planning Officer, in cahoots with the Building Inspector of the Town, telephoned the Appellant concerning certain advertisements. The person they talked to referred them to 179 Pleasant Street, Yarmouth to meet the Appellant's real estate agents. According to the evidence given to the Board by Mr. Mills, the Building Inspector taped these conversations with Mr. Mills' consent. They made no disclosure to the Vaughne people they were taping the calls.

Counsel for the Town argued that this inquiry disclosed a contempt of the Supreme Court Order of Glube, C.J.T.D. He argued it showed a continuing disregard for the planning regulations in force in the Town of Yarmouth.

Councillor Hood, in his testimony, suggests that this apparent contempt shows why Town Council should not trust representations of the Appellant. He felt that they have demonstrated themselves as unworthy of trust in planning matters in the Town.

The Board has adopted the theme there is a "certain element of trust" required in zoning applications.

The Board first specifically mentioned this in Mader v. Municipality of the County of Halifax, (1988), Volume 7-B Part I, M.B.D. page 301. The headnote there says:

> "A rezoning application is based to a certain extent on trust."

At page 312 of that decision the text goes as follows:

> "A rezoning application is based to a certain extent on trust. Council is asked to grant a rezoning based on a specific proposal...where an applicant does not fully disclose his or her intentions it is difficult for Council to be satisfied that it is an appropriate case for rezoning."

The Board has referred to this theme most recently on July 27, 1989, in the case of L & G Holdings Ltd. v. City of Halifax (NSMB-14-89-P) (unreported) on page 9 of the filed decision:

> "Mr. Raphael has responded to certain requirements of the Planning Department in the alteration of his original plan. He impressed the Board as being intelligent, sensitive developer.
>
> Beaufort Mader v. Municipality of the County of Halifax, (NSMB-602-87-P) (unreported) [now reported as set out above at page 361 says:
>
> (A rezoning application is based to a certain extent on trust.)

In Bates and Schuhlein v. Town of New Glasgow (NSMB-4-89-P) (unreported) the Board elaborated on this theme. It said on page 24 of that filed decision:

> (This is not an axiomatic given, but a semi presumption if you will, subject to the introduction of evidence on the point of the developer's trustworthiness and skill. Having heard the principal for the developer in this matter, the Board applied both those "elements of trust" tests to his testimony. He satisfied the Board in these points, at least for the purpose of this appeal.)"

Councillor Hood in his evidence leaned heavily on this "trust" issue. Councillor Hood said that this particular developer had taken steps to "assassinate" the previous Planning Officer. Councillor Hood said this developer was attempting to "assassinate" the present Planning Officer before he could get established in his new job.

Councillor Hood said that since the Glube decision in Vaughne Realty, the Appellant had been very active at the next subsequent municipal election. Councillor Hood said the Appellant's election activity included circulating papers in respect to that election. The Board assumes the Appellant performed this political activity to influence the outcome of the elections.

The Appellant did not directly contradict any of these statements.

On cross-examination of Mr. Mills, the Appellant got from Mr. Mills a statement that the Appellant was a responsible developer. The Appellant has a good history of building good buildings in the Town. The Appellant was (in the past and presently) successfully working on subdivisions as well.

The Board feels, in ordinary circumstances, the Vaughne

Realty decision would be totally irrelevant to any considerations in this particular application. The only common point being the principals in the Company, the Company and the Town. The properties affected by that case and the properties affected by this case are unrelated. They are separated geographically. Madame Justice Glube's Vaughne Realty decision has most relevance to this case as it enters upon the "element of trust". The Beaufort Mader decision, and subsequent decisions cited above, have developed this point.

Mr. Warner alleged, as of a very late date, the Appellant was in still contempt of the Glube Order. He argued, because of such flagrant contempt, the Appellant should receive no benefit of the Beaufort Mader "element of trust" ruling. The Board will not say whether or not, at the time alleged by Mr. Warner, the Appellant was in contempt of the Glube Order. It may well have been. The Board will not find this. The Board has no function to find contempt of Supreme Court Orders. No one has sought to have the Board find the Appellant in such contempt. Even if contempt has not been proven, Mr. Nelson justified Vaughne's later actions by a sharp interpretation of the Glube Order.

Mr. Hood said in part of his evidence words to this effect:

> "Past actions of the Appellant in planning matters warrant a very close scrutiny of their planning activities in the Town."

The very best the Board can say concerning Vaughne's attitude in relation to the Glube Vaughne Realty decision is that its principals engaged before the Board in a rather sharp definition of the Glube decision and Order.

The general thrust of this analysis shows the Board that Council had a right, in making its decision on the present rezoning application, to regard the application of the present Appellant without any special presumption of trust in the Appellant's favour. Until there is a much larger favourable subsequent history of this Developer's treatment of the Town's planning regulations, the Town can scrutinize this application for rezoning with a proper full legal scrutiny.

The Town owes no benefit of doubt to the Appellant.

Councillor Hood's remarks and use of the word "assassinate" in relation to the planners is, the Board assumes, an item of poetic license. The word "assassinate" is inappropriate. Its use may indicate the state of Councillor Hood's mind when, in the P.A.C. and Council, he voted against this particular application.

It is undenied by the Appellant that it participated in the last municipal election in an active manner. The Board can only assume from Councillor Hood's remarks that that participation was against Councillor Hood's political goals. For a developer so actively to pursue political objectives on a local municipal level (and then to fail) may be wise or unwise. The developer made the decision it made. That decision was the developer's to make. The Board does not believe it appropriate that a developer's prior legitimate political activity is a proper matter of consideration by a Council (or any of its members) when deciding a rezoning request.

Once the election is over, perhaps it is time to put into distant memory the activities of the citizens who opposed you.

At present in our society, overt political activity on municipal council level is legal, permissible and desirable. For active developers it may not be too smart.

Whether or not the "worst case scenario" of 8 apartments could be built on this lot merely because of its square footage is somewhat problematical. The worst case will only come to the fore after the footprint of any 8 unit apartment building appears, proposed, on this lot. The developer must tuck such a building in under 35 feet of height. To use the lot in its entirety, a developer must heavily fill it. Fill assumes there is a bottom for the swampy areas of the lot. Once the fill is in there must be provisions for the heavy drainage required for the lot. Otherwise M.P.S. prohibited onstreet flooding and perhaps flooding of private lots could occur. It seems problematical that an 8-unit as-of-right building could be constructed economically. Such a building would require extensive on-site works. These works, constructed, would deal with the eastern boundary problem, the common drainage problem, the across-lot drainage. They would have to encompass the back lot drainage. All drainage must eventually lead down to the culvert under the D.A.R. railway.

The evidence shows the Board the most economical ways of development is the way proposed by the Appellant. It proposes to put on the lot either an as-of-right duplex or the four unit double duplex. The Appellant proposed these buildings towards the front or southern portion of the lot. It reserved the back of the lot for open space parking and general drainage. The proposal allows drainage for this lot and for the higher up properties that already drain into it.

The Board has quoted extensively from the Minutes of the P.A.C. and the Minutes of Council appearing in the Appeal Record.

The first thing that causes the Board concern is the fact stated in the planner's report and adverted to in each subsequent Minute. "A rezoning for an 8-apartment unit had been turned down". At the hearing counsel for the Town conceded this false. The "8-unit apartment" theory appears highly profiled in every report.

The Board heard of concern for the citizens. One citizen attended the Board hearing. He said calmly, and quite clearly, that he had no objection to a duplex as-of-right construction. He felt concern with the 8 unit construction. He did not much like the 4 unit double duplex.

The price paid for this lot in its raw vacant state was $10,000.00. The apparent price of comparable size lots for an R-1 lot is in the $20,000.00 or $30,000.00 range. It is apparent that this is a difficult lot to develop. The approved lot has existed for some time. It is still vacant although many of its neighbouring lots now have houses on them. The Appellant's witness stated close location of this lot to the railway boundary make this a less suitable lot. It is not really suitable for installing either a duplex or a single family dwelling. The market price reflected these difficulties.

Another point of the Board's concern is the wording expressed in the minutes of the P.A.C. meeting of August 8, 1988.

> "The Planning Advisory Committee take the recommendation of the Planner and **not rezone the lands in question from R-1 to R-2**."

Some evidence was adduced to say the P.A.C. did not make the rezoning decision. P.A.C. merely made a recommendation to Council. This type of wording was followed in other "refusals" in those P.A.C. Minutes. The Board notes that in the text of the Minutes on a positive motion "It was moved by Councillor MacLeod and seconded by Mayor Crosby and carried that the Planning Advisory Committee recommend to Town Council that [and so on]...the matter of rezoning be advertised for public hearing." Therefore, the P.A.C. Minutes clearly show a distinction between a refusal and a recommendation. The P.A.C. decided a refusal. It recommended an approval.

At page 50 of the Appeal Book "as recommended by the Planning Advisory Committee" is the phrase used in Council's operative denial motion.

The Board has a real concern that the P.A.C. Minutes accurately show the mind set of Town Council. Although, apparently, corrected in the Council Minutes, that is the mind set that appears in the P.A.C. Minutes. It may be the mind set Council has on this rezoning.

It is clearly not the decision of P.A.C. in Yarmouth to decide zoning issues. Council must decide zoning issues. Some committee should not decide zoning applications before Council decides them. This apparent mind set is particularly dangerous when Council does not allow the opportunity for public hearing. The Board suspects the wording of the P.A.C. Minutes may accurately reflect the mind set of Council. If that is so, that mind set is not appropriate.

On the assumption that the action of P.A.C. did not cause Council to fail to decide the rezoning application, the Board will then look at the planning basis of this decision. The planning officer's report most fully sets out the planning reasons for Council's decision.

The Planner says that the minimum width of the driveway for two-way traffic must be 20 feet. The Developer did not propose this driveway configuration or width in its initial proposal. It did not propose a 20-foot right-of-way. The Board feels the developer could easily adjust, as it suggested, to two ten foot driveways. Somewhere in the 80 foot frontage, the Developer can set 20 feet of driveways.

The M.P.S.'s Implementation Policy 6BD relates to considers the proximity of the subject property to the D.A.R. level crossing. The D.A.R. right-of-way constitutes the west boundary of the subject lot. The actual location of the D.A.R. level crossing of the tracks centers somewhere in that D.A.R. property. It is certainly not adjacent to D.A.R. property on its western boundary; but it is somewhere nearer the centre of the same. Therefore, there is a distance (unspecified) between the actual crossing and the west boundary of the subject lot. The Board should think before negatively criticizing this specific project, the Planner should have taken some on-site measurements to show the exact distance between the rail line and the lot's west boundary line. This measurement might help show where to construct the western 10-foot driveway.

The level crossing is appropriate for a right angled crossing of the highway, basically without warning signals. The powers-that-be considered that the crossing of Hibernia Street and the railway needed no extra warning signals. The entire traffic on Hibernia Street did not need those signals. The Board cannot see the traffic of six additional vehicles moving in and out of the subject property are a determinating matter of planning concern. The Board can see no substantial difference on a traffic consideration between two, four, six or eight units on the lot in any event.

The Planner's report discusses the potential traffic generated by an 8-unit residence. It reports the driveway being far too close to a level crossing right-of-way.

The Planner refers to Section 5.16 of the L.U.B. In his interpretation of that Section, the planner says this lot shall not have access to a local street located within 50 feet of the limits of the railway right-of-way.

The Board has looked at Section 5.16(3):

> "No access shall be located at a local street within 50 feet of the limits of the rights-of-way at an intersection".

The word "intersection" is not specifically defined in the L.U.B. in its definition section.

Hibernia Street is regulated by the **Motor Vehicle Act** and the **Public Highways Act** as well.

There is no definition of "intersection" in the **Public Highways Act**.

The **Motor Vehicle Act**, R.S.N.S. 1967, C.191, Section 1(u) says:

> "Intersection means the area embraced within the prolongation or connection of the lateral ....
> or, if none, then of the lateral boundary line of two or more highways which join one another at an angle, whether or not one highway crosses the other."

The railway right-of-way does not agree with this definition of "intersection".

The Board has looked at the Random House College Dictionary, Revised Edition 1975, which defines "intersection" as follows:

> "...1. a place where two or more roads meet, esp. when at least one is a major highway. 2. any area or place of intersection. 3. the act or fact of intersecting. 4. Math. the set of elements which two or more sets

have in common..."

The Board takes the **Highways Act** definition of the word "intersection". The Board takes the first meaning of "intersection" in the Random House College Dictionary, as being the ordinary meaning of "intersection" as used in this L.U.B.

The relative proximity of the railway crossing and the lot's driveway[s] is a matter of observable traffic concern. By an intelligent application of the 20 foot driveways to the 80 foot street frontage, having regard to the actual location of the rail line, (at the crossings) there could be a compliance even if Section 5.16(3) of the L.U.B. applied here.

No definition of "intersection" is in the Part 26 definitions of the L.U.B. "Intersection" therefore carries its customary definition.

The crossing of a railway with a highway is not an intersection as contemplated by Section 5.16(3) of the L.U.B.

The planner's question here is: "Is the D.A.R. railway right-of-way crossing Hibernia Street an intersection?" The Board answers the question with a decided "No".

How correct, as a planning determinate, is the municipal fear, frequently expressed, that the potential 8-unit apartment building would be too heavy for the neighbourhood. The lot is very sensitive to develop. That sensitivity, the Board feels, helps explain in its low purchase price of $10,000.00.

The Board notes M.P.S. (Implementation Sections)

Section 6.8.(e) refers to potential for contamination of watercourses or the creation or erosion or sedimentation. There are some drainage swales on the east and across the centre of the lot. These are not, in the view of the Board, watercourses. The only possible nearby watercourse is the one to the rear of the lot that has some water in the bottom. That, from appearance, is contaminated fully now. See 3(g) of the same section of the M.P.S. Development can occur so as to not obstruct any natural drainage channel or watercourses. With relation to this particular clause of the M.P.S., it is clear that there are no relevant watercourses. Therefore, there is no obstruction planned of any watercourses.

If the swales mentioned are natural drainage channels (they may not be natural) common sense, economics and good planning would meet. They would say that the drainage would have to remain open (as it is) or be properly crocked to accommodate a development.

The Appellant proposed to keep them open. Whether that is suitable or not for development of this site is a matter of opinion.

M.P.S. Section 6.8(4) deals with "suitability and development costs of the proposed site in terms of proximity of...railway rights-of-way and other nuisance factors." The Developer proposes to put four families in close proximity to the D.A.R. right-of-way. It obviously feels that this is an economically sound proposition for it. The Planner says that as many as eight families could be put in close proximity to the D.A.R. railway after rezoning. The Planner says, as-of-right, one family or two families could be accommodated on this lot now. Any railroad nuisance would enure to these two families.

The Developer obviously feels that a one family unit will not sell this close to a railway. It, as late as May, 1989, applied for a development permit (the Board can only assume in all seriousness) for duplex construction. It obviously now prefers (since June, 1989) to build four units of a very presentable type of housing on the property. The Developer has chosen expressly to denounce any intention of putting eight residential units on the same lot.

Whether this is an economic or a political-economic decision that the Developer has made, the Board does not know.

The Town's reports all speak of fear that this may be a dishonest application. It may really be a proposal for 8 units.

The Board is unable to rely on any "element of trust" presumption in favour of the Appellant in this case.

Development could proceed, assisted by the intelligent use of crock, accommodating any drainage channels, natural or otherwise on the property.

The Developer feels the railway right-of-way as a nuisance factor to the prospective inhabitants is obviously not too great. The railway presence will not destroy the Developer's ability to rent the four units proposed. There was no evidence led as to the frequency, duration and nature of the railway traffic, if any, on this railway line.

The planner also adverted to M.P.S. Section 6.8(3)(h) "similar matters of planning concern". Under that heading he put the requirement (admitted for this proposed development) of a minor variance. The developer contended that a minor variance was anything under 50% of the requirement in the given L.U.B. provision. The Planner thought it should be a minimum variance of 10%. There is no direct support in the **Planning Act** for either position except in the word "minor". Both of these interpretations could fall within the meaning of the word "minor". Both interpretations deal with less than one-half of the minimum L.U.B. requirement.

The Planner said that he could not define a minor variance much closer than that. He looked to the **Planning Act** for guidance in this matter. The Board therefore quotes from the minor variance section, Section 79 of the **Planning Act** in full:

> "79(1) An application may be made to a municipal development officer to grant a minor variance from the requirements of the land-use by-law with respect to
>
> a) the percentage of land that may be built upon;
>
> b) the size of yards, courts and other open spaces;
>
> c) lot frontage;
>
> d) lot area.
>
> (2) No variance shall be granted with respect to clauses (c) and (d) of subsection (1) unless the lot was existing at the time of the coming into force of the by-law or a variance has been granted for the lot pursuant to Section 98.

> (3) No variance shall be granted where
>
> a) the variance is not minor, in that it violates the intent of the land-use by-law;
>
> b) the difficulty experienced is general to properties in the area; or
>
> c) the difficulty experienced results from the intentional disregard for the requirements of the land-use by-law."

The variance sought here fits within Section 79(1)(b). The Developer seeks the reduction of the side yard in each case by a foot and a half. This is roughly 10% of the side yard requirements on each side.

The Development Officer may grant such a variance. He can grant no variance under Section 79(3) where the variance is not minor because it violates the L.U.B.'s intent. Section 79(3)(b) has no application in the present case.

The Planner says that Section 79(3)(c) creates the difficulty here. He said the proposal results in "the intentional disregard for the requirements" of the L.U.B. He says in this case the latter is intentional because the matter is proposed. He says the developer knows in advance the L.U.B. requirements. Despite that, the proposed development contemplates, in advance, the minor variance.

If the Board understands the Planner's views correctly, had this same building:

1) been built on the same lot,

2) had built pursuant to an apparently regular application showing an, through honest error, regular

side yard clearance;

3) had received an apparently regular development permit embodying that honest error;

4) had been completed, and

5) the error being discovered and the side yard deficiency noted,

the Development Officer would then be in the position to consider whether or not it was a minor variance.

The Board assumes the Planner's interpretation is he can grant minor variances to deal with undersized lots that are already in existence. Minor variances can allow buildings on those lots regardless of the side yard clearance. The wording of 79(3)(c) of the **Planning Act** can support that type of reasoning. The Board feels, however, that Section 79(1)(a) of the same Act contemplates futurity in that it says the percentage of land that "may" develop. This subsection contemplates, inter alia, a totally vacant lot which may, by minor variance, sustain an oversize, but legal, building.

In any event, the Planner brought this minor variance application to the Board's attention. He said it is a non-compliance with the M.P.S. Section 6.8(3)(h). He said it is "a matter of similar planning concern". He said the need for a minor variance is reason to turn down the rezoning.

Under Section 80 of the **Planning Act**, the Development Officer must give notice if he decides to grant the variance. He must give notice to the assessed owners, to people within 100 feet of the property, and to the Director. Those persons served with a Notice may appeal the decision within fifteen days to the Town Council. The Council then can decide any decision which the Municipal Development Officer could have made. There is no apparent appeal provided for in the **Planning Act** beyond the decision of Council.

It is not the function of the Board in this case to decide whether the Appellant obtains the variance sought. It is purely the function of the Development Officer. If his decision dissatisfies the developer by refusing his application, the Developer may appeal that decision to Council.

If this lot were rezoned under a Board Order and if the minor variance were not granted (given the record of the developer in its sharp attention to planning regulations), it is conceivable to the Board that the Developer might then design a different foot print building allowing for an eight-unit apartment. This 8-unit apartment would comply with the L.U.B. side yard requirements because of its design. The Board feels that this developer will not readily suffer additional frustration at the hands of the municipal officials and representatives.

The Board's previous comments shows that it was easy for the developer to re-design its roadway and its parking to meet criteria. The developer could easily provide enough parking area. It could easily provide adequate vehicular access to and from the lot. It could easily alter its proposal to avoid or to control the drainage problems.

The footprint of its proposed building on the land and the side yard clearance is not so easily changed.

The Board has seen the model of the building proposed located on another town lot. It has seen the photographs of the already constructed model building. If the developer reproduced that model building on the lot, it would be compatible with the other buildings in the neighbourhood. The Board thinks this even though the proposed building contains four residential units while the nearby lots may contain only one or two residential units apiece. There are other multiple residential houses in the general neighbourhood. One can find some within the near proximity of 500 feet. This is the area prescribed by the Board for circulation of its Notices of Hearing in appeals.

The railway on one side of the lot militates against a single family dwelling. Perhaps it would make more economic sense to develop with a multiple unit residential building.

The Board appreciates the genuine concern for "eight units worst case scenario". It also points out that inaccurate reports and minutes have been made concerning this scenario. The Board is unable to discern whether these inaccurate reports affected the decision of Council or not.

The Board goes back to the general Implementation Policies at page 67 and following of the M.P.S.:

> "The Town has two major concerns with respect to the filling of land and private alteration [p. 68] of land grades. The primary concern is the control and management of storm drainage and the transfer of

> existing water from one lot to another or from a lot to a public right-of-way. When water is displaced as a result of filling it must be managed so as to not create further problems on the adjacent lot or public street. The Town is also concerned about the type and quality of material being used as fill with its potential impact on subsequent development...provisions for the regulation of the altering of land levels, both filling and excavation activities for the purpose of preparation of land for development or in conjunction with any permitted development would be included in the Land Use By-law to address these issues consistent with the policies contained in the Strategy."

The introduction to the implementation policy is directly related to this particular site. This lot has on-site drainage problems, cross-site drainage problems. It is adjacent to a major drainage problem on its north line. These drainage problems raise "similar matters of planning concern" as well.

The Planner's contention that he cannot deal with this application because it is an intentional minor variance may be an incorrect interpretation of the **Planning Act** minor variance sections. Some sub-sections on minor variance do contemplate prospective construction.

The Planning Officer has not made any determination on the outstanding application for minor variance. He would not properly do so until after the proposed rezoning were in place.

The Development Officer has a discretion on minor variances under the **Planning Act**. A decision made under that discretion is appealable to Council by the Developer. Neither one of those functions are of a direct concern to this Board, nor can they be.

There may be children emanating from an 8 unit apartment building. Perhaps more children than would likely be from a single family home or a duplex built on this property as it is zoned now. Their numbers should not be that much greater. Not great enough that the proximity of the level crossing will be a total deterrent to the building on this area or the rezoning on this area.

There appears to have been an extremely heavy emphasis leading up to the decision of Council, of "the worst case scenario of an eight apartment unit building".

The Board is not sure, given the general nature of the neighbourhood, that an 8-unit apartment would be totally inappropriate on this site.

Assuming an 8-unit apartment would be totally inappropriate for this lot, should Council have taken into account the "bona fides" of the Applicant's desire to put in its building to a maximum of four units? There has been a suggestion of a restrictive covenant to ensure this result. A restrictive covenant would not be applicable since the Town could not take it.

A development agreement is not available to solve this matter.

It is curious whether a voluntary bond entered into by the developer, accepted by the Town and secured against the real estate might not suffice. Such a bond might guarantee that the development not exceed the four unit double duplex. The building sought by the developer and promised by the developer would be compatible with the neighbourhood despite its four residential units.

The issue on this appeal boils down to whether the decision of Council reasonably fits within the intent of the M.P.S.

The Board has quoted, criticized, and commented upon the report of the Planner. The report of the Planner refers to 8 apartment unit building already turned down. Minutes of the Council, the Minutes of the P.A.C. refer to this. All these matters were brought before Council. Counsel noted this false statement.

Councillor Hood, at least in his mind, [as Chairman of the P.A.C. and former Municipal Solicitor and long time Councillor] felt the political activities of the Appellant in the last municipal election were not appropriate for a developer. This, again, is not a concern under the M.P.S.

Many of the questions raised by the Planner in his report were not answered by himself in that report. Yet he phrased the report in such a manner with these unanswered questions so as to cast a doubt on the application.

The Board is not yet certain that Council had before it the appropriate advice and information. Much of the information was inaccurate. Much of the information seemed designed to mislead and, perhaps, may have mislead the Council in its views.

The Board then will consider two issues. Does the proposal fit reasonably within the intent of the M.P.S.? Can the decision of Council can reasonably be said to fit within the intent of the M.P.S.?

Both sides cited cases and decisions of the Board, which the Board considered.

The Appellant cited in its appeal Maritime Residence Estates Ltd. v. Town of Truro (1987) 6-B (Vol. II) M.B.D. 642 for the proposition contained in its headnote:

> "The opposition of people in the area is not a sufficient basis to refuse approval."

The Board notes that the popular opposition to this proposal applied to the Board was light and carefully measured. The Minutes do not clearly demonstrate what popular opposition was put to Council on the Public Hearing. The Board, therefore will not use here popular opposition very strongly in its consideration of Council's decision.

The Town's solicitor cited:

1. Rajendram v. City of Halifax, (1987) 6-B (Vol. II) M.B.D. 608 for the proposition:

> "The Board upheld Council's refusal of a development agreement where there was insufficient square footage and rear yard for the proposed use...and there was a concern for high density development."

At page 611 of Rajendram the Board says:

> "...it does not have sufficient square footage or rear yard to permit an as-of-right development of the size which the Appellant wishes to build."

The present Board merely sees this as an exposition of why the Developer needed a development agreement. At page 612 of Rajendram, the Board says:

> "The real issue in this appeal is what is the appropriate "neighbourhood" to which the policies apply."

In the present case, there is enough square footage for all on-site development required after the rezoning. The only shortage in the present proposal for development is the side yard differences of the proposal.

Rajendram does not help the Respondent otherwise.

2. Mader v. Municipality of the County of Halifax (1988) 7-B (Vol. I) M.B.D. 301 is cited for:

> "A rezoning application is based to a certain extent on trust."

It states also:

> "Council is asked to grant a rezoning based on a specific proposal."

The present Board endorses the headnote of Mader:

> "A rezoning application is based to a certain extent on trust."

Mader and its following have been cited in Bates & Schuhlein. These decisions describe the "trust" limits for this appeal.

As to the proposal before Council the headnote in Mader states:

> ""Air of mystery" surrounds proposal put to...Council.... Although Board cleared any mystery away at the hearing, a lack of knowledge might have affected Council's decision. Concern of lack of disclosure was expressed at the public hearing."

Mader also, at page 310, is additional support for detail in staff reports:

> "It is preferable if the Staff Report specifically addresses all the relevant policies and comments on their applicability to the case at hand. This ensures that Council is aware of all the policies that they are required (in the Planner's opinion) to consider and in the event of an appeal provide a clear indication to the Board of the policies which were considered."

The "air of mystery" summarized in Mader appears in the middle of page 311. At page 312 in the context of this "air of mystery" Mader has the phrase "Council is asked to grant a rezoning based on a specific proposal... Where an Applicant does not fully disclose his or her intentions it is difficult for Council to be satisfied that it is an appropriate case for rezoning." Mader does not require in this case, each detail of the proposal frozen for Council. This case has none of the obscurity of ownership of the land, or the extent of the land concerned that created the "air of mystery" in Mader.

In the present case, the proposal was in sufficient detail for the full understanding and consideration of Council. The various options put to the Board, and not to Council, concerning location of parking and driveways could have been, or perhaps should have been, identified by the Planner. He could negotiate these details out with the Developer before the Council public hearing date. Even if the developer did not understand this, the Planner should have.

In this case the general essential outline of the proposal was before Council. The detail changes presented first to the Board, and objected to by the Respondent, were not essential to Council's consideration of the proposal at the public hearing. The Planner could have, and in the view of the Board, should have, analyzed the proposal. He should have assisted the Developer in meeting the minimum requirements before the public hearing. Planning should be a co-operative venture. It should encompass Town/Planner/Developer working together to make the best use of the land for the people of the Town.

3. The Town's counsel cited Erfani v. County of Halifax (1988) 7-B (Vol. I) M.B.D. 143 for the proposition:

> "While the Board agrees that future uses of the property may be taken into account to some limited extent, it cannot in the Board's opinion be the sole or major consideration."

The headnote at page 143 says:

> "Council's discretion, however, must be exercised properly and a refusal must be reasonably consistent with the intent of the M.P.S. Here Council proceeded on the basis of incorrect facts and placed undue emphasis on the worst case scenario."

The text of that decision at page 152 supports this headnote. The Board agrees with Erfani. Erfani supports the Appellant's position. Council in this case employed the worst case scenario. Council in this case had reports which contained wrong material facts.

4. Woodworth and Schwartz v. District of East Hants (1987) 6-B (Vol. I) M.B.D. 128 prevented a commercial rezoning in a rural residential and natural resource area. The Board there found the proposal was incompatible with surrounding land uses.

The Board in this case does not find the proposed four unit residential development incompatible with the residential development on one side. The proposed development is not incompatible with the apparent vacant lots on the opposite sides of the street, the apparent vacant lots behind it and the railway line on the other side.

5. Murphy v. Town of Antigonish (1987) 6-B (Vol. I) 202. In this case Council had approved a rezoning from R-1 to R-3 at page 226 the Chairman said:

> "The standards of the R-3 Zone with respect to apartment house use have not been met because of the fact that the subject land rezoned by the Council is 82' and the R-3 requirement for this type of use is...100.064 feet.
>
> Having determined that the decision of Council does not reasonably carry out the intent of the Town's M.P.S...."

Clearly the rest of the Chairman's remarks in this decision are **obiter dicta**, useful, perhaps, for guidance in that situation. The Board does not find the **obiter** particularly helpful in the solution of this appeal.

6. In Benham v. Town of Lockeport (1987) 6-B (Vol. I), M.B.D. 328, Town counsel cited this as a case where the Board supported the "worst case scenario". Town counsel also suggested that the Board greatly altered, on appeal, Town Council's description of the area rezoned. The Board has tried to re-read Benham with respect to these two representations. The headnote at page 329 recites Mrs. Benham's position:

"The main objection of the Appellant to the rezoning is

> the worst possible use...as to the worst case scenario the Board is satisfied the Applicant intended to build what it had proposed...".

The Board in Benham made only minor alterations in the area of land rezoned. The headnote sums up the land position accurately:

> "The M.P.S. also permits only a one lot "tier" of M1...the necessary precision can be achieved by reference to the 40,215 sq. ft. area...on a plan exhibited to the Board."

Page 337 of the decision alludes to the land rezoned by Council and the land rezoned by the Board:

> "The major difference between the land depicted in the Hunt plan (Exhibit B-32) and the land depicted in the other diagrams before the Board that is readily apparent to the eye is the absence of the... 30' wide finger of land extending between Church Street and the **main bulk** of the Pierce Fisheries Limited land." [emphasis of the Board]

The diagram on this page of the Benham decision shows how inconsequential the discrepancy in the land was.

At page 398 of Benham the Board wrote "the main valid objection of the Appellant to the rezoning is the "worst possible use scenario"...". The unfortunate word in that quotation is "valid". Read in context, the Board feels the headnote previously cited correctly catches the flavour of Benham on this point. The same paragraph also contains the expression the quotation "next most valid objection...". This makes it clear that the Board in Benham was not finding that the "worst case scenario" was always a "valid" objection to rezoning.

The use of the word "valid" in Benham leading to the present proposition and interpretation by Counsel for the Town, was unfortunate. Perhaps it should not have been there at all. The sentence would then still have read correctly. Perhaps the Board should have said "most arguable".

If Benham means what Mr. Warner said it means, then Benham, on this point, was wrong.

8. Mr. Warner cited Oakdene Estates Limited v. County of Halifax (1985) 4-B M.B.D. 1. Oakdene's proposal was to rezone to build a 70-unit residential apartment house on an approximate 5 acre site. If rezoned, the site could contain, as of right, 132 residential apartment units. The Appellant applied for rezoning from R-1 to R-4. Council refused the request. At page 25 of the decision the Board says:

> "If the maximum allowable 132 units were built...the "adequacy of separation distance from low density residential [page 26] developments" might not be satisfactory."

And at page 28:

> "Although the Appellant's requested rezoning was recommended by staff and the P.A.c., in the opinion of the Board, Council may legitimately refuse to rezone...because of concerns raised by area residents which indicate the development does not meet the intent of the M.P.S."

Further at page 29:

> "...the mechanism of a development agreement would be appropriate for the lands...to accommodate the development of a sizeable interior parcel of serviced land surrounded by existing residential and commercial development."

In Oakdene, the Board confirms Council's refusal decision. Percentage density increase between the as-of-right proposed development in Oakdene and the proposed development in this appeal are in the same approximate percentage range.

There is no hope in the present case of restraining the development to the secret interior of the lot. Impact of the 8-unit apartment building on nearby single family homes would not be near the impact that 132 units would be on nearby single family homes.

The Board does not find Oakdene helpfully relevant to the concerns of this appeal.

9. MacIntyre et al v. County of Cape Breton (1987) 6-B (Vol. II), M.B.D. 616 deals with an area not under an M.P.S. The criteria of the Board's decision in MacIntyre are different than on a rezoning appeal on land under an M.P.S. In MacIntyre the rezoning would insert an industrial type of criteria in a residential zone. Under this new zone Council would rezone the particular land to this particular residential/industrial zone. That is not the case here. The Board does not find MacIntyre helpful in this appeal.

10. The decision Ranni v. City of Sydney (1987) 6-B (Vol. I) M.B.D. 176 seems to support the Appellant's position. The headnote states in part:

> "...there is a shortage of vacant R-3 land...the subject site because of its swampy nature is unlikely to be developed in the near future for single family dwellings...some members of Council made their decision...not on the intent of the M.P.S. but as a result of submissions by area residents. Council may give consideration to these opinions, but must make its decision based on reasonably carrying out the intent of

the M.P.S."

All these factual conditions seem to exist in the present appeal.

Ranni has been cited (more favourable to the Appellant's position) elsewhere in the Town's Memorandum where it refers the Board to its previous ruling:

> "If Council does not agree with the recommendation of planning staff, it should have some reasonable basis for so doing based on the intent of the M.P.S." [Headnote] and [page 200 of the Decision] "...and not on the opinions of some of the residents of a particular area of the City where the proposed development is to take place."

Council argued Mr. Warner, must have good grounds for ignoring the advice of his planners. The Board has made full comment on Ranni in its present decision.

11. In Bigney v. District of East Hants (1987) 6-B (Vol. II) M.B.D. 498, the Board ordered a rezoning. At page 515 the Board said:

> "...the objections to the rezoning as expressed to Council do not warrant a refusal."

The Board followed the Planner's opinion which was uncontradicted by any other Planner. This shows up in the decision at page 516:

> "...the Municipality is not bound to follow the advice of its Planning Advisors but if it chooses not to do so it must do so for reasons that can be expressed and stated in terms of the M.P.S."

Thus there is an imputation made in Bigney in the above-quoted phrases that the Planner's advice, to be followed, must be correct advice.

12. Parkin v. District of East Hants (1987) 6-B (Vol. II) M.B.D. 565, as does Bigney, prefers the Planner's advice to the refusal decision of Council.

13. Home East Developments Ltd. v. County of Halifax (1987) 6-B (Vol. I), M.B.D. 94, [leave to appeal refused Supreme Court Appeal Division S.C.A. No. 01772]. At page 119 it states:

> "Therefore, for an Appellant to succeed on an appeal pusant [sic] to Section 63 the Board must determine that the Council's decision does not reasonably carry out the intent of the M.P.S. and that the proposed amendment to the Municipality's by-law is within the intent of the by-law [sic; means M.P.S.]..."

And further at page 126:

> "...there was no evidence before the Board that there was any substance in the subject matter of these concerns. On the contrary the evidence [of the planners] dispelled those concerns."

The Board accepted the Planners' opinion in full in Home East. The Board does not accept all of the Planner's opinions in this case.

The Respondent draws a long bow with Home East. To use it to its advantage it must say:

1) that any decision of Council not supported by its planners may fail,

2) that a decision of Council (refusal or otherwise) supported by a planner will survive appeal, and

3) therefore the refusal decision of Council (since it is supported by Planners in this case) should

survive appeal.

The Board will only say that good planning advice deserves respectful attention by Council and, on appeal from Council, by the Board.

12. Finlayson v. Sydney Mines (1987) 6-B (Vol. I) M.B.D. 163, is a rezoning R-1 to C-1 which Council allowed and neighbours appealed to the Board. The Planner advised against rezoning. The Board upheld his advice. The incompatibility of the two zones, residential v. commercial, keep Finlayson from being much help to the Board in the present appeal.

13. Century 21 v. Town of Truro (1985) 4-B M.B.D. 68 decision reports the Board's decision of a developer's appeal from the Town's refusal decision. Council refused to grant a development permit for a portion of an existing building. The Planner and the P.A.C. advised the Town to enter into the agreement. People of the area opposed the application. Council agreed with the people. The Board on Appeal agreed with the Planners.

14. Carey v. County of Kings (1985) 4-B M.B.D. 96 supports the proposition that the decision of Council should be made within the intent of the M.P.S.

The Headnote at page 97 says:

> "The property if rezoned to Institutional would not conform to the side yard regulations for an I-1 zone. The Board recognizes the legitimate concerns of Council in not wanting to appeal to sanction the use of property contrary to the Land-use By-law, but these concerns are not a matter for the Board to consider in an appeal from Council's decision."

This last statement startled the Board to look for support for the statement in the text of the decision.

At page 116 of the decision the Board decided:

> "The Board finds that the subject site lies partly within the area of land referred to as the business district on the future land-use map and partly outside the business district....[page 117] ...Implementation Policy 16 can be invoked to consider the area of the subject site outside the business district for a zoning amendment to an institutional use. [page 118]...There is no policy direction in the Municipal Planning Strategy to cover situations where an amendment to the Land-use By-law which otherwise carries out the intent of the Municipal Planning Strategy results in the rezoned property contravening a zoning regulation."

Then at the bottom of page 118 and the top of page 119 of the decision the Board makes the statement supporting the disquieting headnote.

The Board therefore looks at the M.P.S. in the present case. Objective 3, Chapter 3, page 17 of the M.P.S. requires the Town to regulate medium density residential development. It requires such development to ensure its compatibility with adjacent residences.

Policy 1.4-2 authorizes the R-2 zone in the L.U.B.

Policy 6.2 makes the L.U.B. the instrument to carry out the Land Use Policies. L.U.B. Section 9.2 (page 23), so authorized, requires 15-foot side yards on the present development.

The proposed development after rezoning would be somewhat futile if a development permit could not issue for it.

In Carey there is some doubt whether a "minor variance" or a development permit was required. In the present case the Developer requires both a development permit and a minor variance to support the proposal. It needs these, as well as a rezoning, in order to encompass the present proposal. In the present case the paper trail from the M.P.S. to the L.U.B. side yard requirements are clear. In Carey, the Board said there was no such link. Thus, Carey's worrisome second statement "the Board cannot be concerned with side yard clearances, on appeal" does not, because of the different facts and different M.P.S.'s in the two cases, apply in this appeal. If the present Board is wrong (and the principle of Carey should, in logic, be applied here), the Board would refrain from following it. The Board will not order a Council to disregard its own valid planning legislation.

This seems to conclude all the cases cited by the parties in this matter.

This concludes the Board's reading and analysis of all the decisions cited to it (and some not cited). The Board notes that it has previously mulled over various pieces of the evidence presented at the hearing.

Now the Board will try to deal with the specific arguments of the active parties as they appear.

The Appellant argues that the "only areas of concern [are]...in regard to Implementation Policy 6.8 [specifically]...6.8.3, C,F,G." Mr. Warner for the Town did not directly agree with this submission. He did deal with the planning concerns raised under M.P.S. policy 6.8-3, C,F,G.

In addition to the disputes Mr. Warner had with the Appellant's satisfaction of policies 6.8-3, C,F,G, he had certain other general arguments in favour of Council's decision and against the Appellant's rezoning.

Mr. Warner argued that the Appellant to succeed in this appeal had to prove:

1. Council's decision "cannot reasonably be said to carry out the intent of the M.P.S." and
2. The Appellant's "request for rezoning" carried out the intent of the M.P.S.

The Board agrees with this general argument of the Town. The Board might like to rephrase the proposition thus: "For the appellant to succeed in this appeal:

> 1. the rezoning proposal put to Council must **reasonably** fit within the intent of the M.P.S. and [the Board must find]
>
> 2. the decision of Council refusing to rezone can not reasonably be said to carry out the intent of the M.P.S."

The Board will decide this appeal on the evidence and the argument in line with this general proposition.

Mr. Warner also argued that the M.P.S. encouraged the type of as-of-right density possible under the rezoning to locate elsewhere in Town. The Appellant argued that it had no suitable land elsewhere. It argued that, regardless of this expressed intent, the Town has approved, on rezonings, scattered R-2 Zones. These zones Council scattered throughout various areas of the Town other than the encouraged areas. The Appellant did not regard the areas of the Town in which the M.P.S. encouraged R-2 development as economically sound areas in which to develop, presently, R-2 residential units.

The Appellant argued that the M.P.S. encouraged, but did not make mandatory, R-2 development in those areas.

On the review of the general argument and evidence, the Board does not feel the encouragement in the M.P.S. to place R-2 development elsewhere is a sufficiently strong intent that Council can rest its decision on that encouragement as a sole determinant of this appeal. Council has approved other R-2 developments in areas similar to the subject property and dissimilar to the available "encouraged R-2 areas". Council apparently, in those decisions, did not feel bound by the encouragement in the M.P.S.

It may require special attention in all cases by Council to encourage R-2 development in the "encouraged" areas.

The evidence showed Council did not give such encouragement or much special attention to "encouragement" in other cases. Council therefore has great difficulty in using "encouragement of R-2 development in other areas" as a sole determinant in their present decision. The "encouragement" issue is a legitimate concern of Council. In this case, in the Board's view, it cannot be a sole determinant.

The Board has disposed of the first general argument of Mr. Warner in favour of the Respondent. It now reverts to the Appellants' interpretations of the detailed treatment of M.P.S.

Section 6.8-3, C,F,G. These arguments of the Appellant raise issues important to the outcome of this Appeal.

M.P.S. Section 6.8-3 C deals with:

"i) Traffic growth; and

ii) Access to and egress from the site; and

iii) Parking."

Mr. Warner suggested the Board may only consider these aspects of the case, in respect of the proposal put before Council.

The Appellant's argument, in essence, says the planner/developer should apply intelligence, knowledge of the regulations and knowledge of the lot in question. Such application allows creative planning to take care of any problems that have been raised concerning parking and access. The Appellant argues that construction and occupation of the land following a rezoning would create a minimal traffic increase. That would prove to be no planning problem. As to street traffic **per se**, the Board agrees with this argument.

Access and egress in relation to the lot itself, the location of the driveway(s) in relation to the railway crossing and the next door neighbour's driveway are planning concerns. The lot allows a solution which will fit all these L.U.B. requirements.

Mr. Warner says such a solution was not before Council. The Appellant did not bring it there. The size and configuration of the lot and its surroundings were before

Council. More importantly these features were before the Planner as of the date of the Appellant's application. If Council were knowledgeable about these possibilities under the L.U.B. for change in the proposal, it should have dealt with them.

If Council was not knowledgeable of these possibilities under its own regulations, its planner should have been. He should have informed Council about the possibilities of change.

There is nothing in the evidence to indicate to the Board that the Appellant came to the Planner and said:

> "Here is my proposal. I request that parking and access be left just as I have it in the proposal. Take this proposal specifically to Council then. Let me know the answer."

Before the Board, the Appellant's position was that it was flexible as to access and egress. The lot frontage permitted that flexibility.

The Planner testified that he gave the Appellant no objections as to these aspects of the application at the application stage.

The L.U.B. requirements have to be met for a development permit. The lot would accommodate such changes in order to obtain a development permit. The Board previously in the decision has mentioned parking, access and egress. Council cannot use access and egress precisely as spelled out in the proposal as a determinant supporting its refusal decision.

Parking as it affects drainage of the lot and surrounding land is a legitimate concern of Council. The proposal itself contains the phrase "existing drainage to be maintained". The proposal identifies the open ditch one-half way along the eastern side of the lot. It also identifies the diagonal swale across the lot that joins it.

As pointed out before in this decision, neither of these is a watercourse under the meaning of the M.P.S. policy 6.8-3G. Neither of these is a "natural" drainage channel since both are obviously man-made.

If Appellants stipulate this on its proposal to accommodate a Planner's misconception of M.P.S. policy 6.8-3G, then it was an unnecessary accommodation. If the proposal's intention was to leave the ditches open and unobstructed by any part of the development, the M.P.S. does not require that.

The presence of a drainage problem was clearly proven by the Town.

This drainage problem would properly fit under M.P.S. policy 6.8-3H:

"Similar matters of planning concern."

Common sense requires the developer meet the drainage problem before development. Economic sense requires it meet the drainage problem before development. The Board would like to think that the proposal (to agree with the M.P.S. Policy 6.8-3H) should properly have stated:

"Existing drainage to be maintained or improved."

That type of provision would accord with M.P.S. policy

6.8-3H. The intelligent fill of the lot for parking, possible crocking of some or all of the drainage might occur. The possible construction of a bridge over the diagonal drain could have allowed the large lot development. Such a development would accommodate rear lot parking and unblocked drainage.

Mr. Warner's argument clearly and carefully specifies that the L.U.B. allows no control over drainage at the development permit stage. He is expressly silent whether the Town has a building by-law. If there is such a by-law does it regulate lot and cross-lot storm drainage? As pointed out before, development economics requires such drainage.

Parking, as it affects drainage, the developer can adequately install on the lot within the intent of the M.P.S. The Planner and Council could and should have understood this. The developer has expressed a willingness to the Board to re-design to accommodate any development requirements of the parking/driveway/drainage conflicts.

On the other side, the Board finds no fault with Mr. Warner's argument that the Board must test Council's decision only in the light of the "specific proposal before it".

In planning matters, in applications made by a developer, there is a lot of slip/slide in understanding of the M.P.S. and the L.U.B. requirements. Confusion abounds in how they apply in the developer/citizens/council/planner relationship. In order to fulfill general intent for development in the M.P.S., there should be a developer/planner co-operation. This co-operation should help the mutual enlightenment of the developer by the planner. Understanding should increase how a certain lot or area may be developed within the intent of the M.P.S.

When that interaction does not occur before presentation of a proposal to Council, and in the absence of a direction in the M.P.S., the Council may, through ignorance, only consider specific proposals. The Board finds it difficult to restrain its review of Council decisions, made in ignorance, to its consideration of such a "specific proposal before it".

The Board feels, rather, that it must review Council's decision in the light of the specific proposal before it as that specific proposal **should** have appeared. After due co-operation and informed editing by the planner-developer interacting in the process of good planning, the Council would not be deciding in ignorance.

As to parking, traffic and drainage, the Appellant has shown the Board a proposal within the intent of the M.P.S.

Council, after proper developer/planner interaction, should have seen and considered such a proposal. If Council based its refusal decision on the issues of parking, traffic and drainage alone, it is clear, in the Board's opinion, that the decision of Council could not reasonably be said to be within the intent of the M.P.S.

The proposal was specific as to the building to be constructed. It was specific as to the minor variance required.

The Appellant was specific to the Board on these portions of its proposal.

Only when challenged on cross-examination, did the Appellant's witnesses consider reducing the buildings to accommodate the required L.U.B. sideyard requirement.

It is an easy thing to relocate 20 feet of driveway somewhere or other on 80 feet of road frontage. It is another thing to reduce a specific architecturally pleasing four-unit fully designed building by some feet on each side.

It is one thing to crock or bridge some open drainage. It is also a simple thing to fill a bit of lot in order to provide an adequate space for suitable backyard parking. It is another thing to reduce the building as suggested.

The proposed building was put to Council in a clear form Council could easily understand. Council had a model of the proposed building built in its own Town, occupied and available for its view.

Council had the specific knowledge of the necessity of a minor variance to accommodate the proposal built on the subject lot.

In the view of the Board, both the model building and the minor variance were part of the "present proposal". That, in the words of Mr. Warner, what was before Council. In the light of that proposal, the Board should judge Council's decision.

Mr. Warner, and the planner, argued that the minor variance under Section 79(3)(c) of the **Planning Act** was an intentional disregard for the requirements of the L.U.B. therefore, they argued, the Development Officer could not grant the variance. He could issue no development permit for the proposal itself. Therefore, the specific proposal which Council considered could not proceed.

Their argument continued. Council could well decide then it would not authorize by rezoning the specific development proposal which the L.U.B. would prevent from developing.

There is no need to upset the **status quo** with a rezoning for a legally impossible development.

Much, therefore, hangs on the matter of the minor variance. Is it a "minor" variance?

Could the Council ignore this requirement for a minor variance.

If it could, should it?

The parties agree the development requires a variance of side yards to support the proposed development on the lot. They dispute whether or not it is "minor". The Board does not figure in the "minor variance" application decision. It has therefore neither the expertise nor the power nor duty to determine whether or not the variance sought here is "minor". The Board cannot decide should it be granted or not. The Development Officer has the power and duty to decide this issue.

If he refuses to grant the minor variance, the Developer may appeal his refusal to Council. If the minor variance is granted, others may appeal its granting to Council.

Given the attitudes surrounding the proposed development, the planner might not grant the "minor variance". If he did grant such a minor variance, someone may appeal the minor variance to Council. In that case Council, on appeal, might refuse any minor variance granted by the development officer. If the developer receives no "minor variance" after a successful rezoning application, we would be left with a developer, a lot rezoned to its wishes, which cannot proceed with its proposed development.

In such a situation, a developer might easily move to develop the rezoned land to its greated as-of-right density. Council may have forseen this "worst case scenario" of an eight-unit residential apartment on the lot. What the Developer could do in such a situation is not, in the Board's view, a determinant of this appeal.

The determinant, in the view of the Board, is the proposal Council decided upon contained a specific building and that building required a minor variance. Council was entitled to decide that it would not authorize a proposal which could not be built as-of-right.

In this context, the decision of Council can be said reasonably to carry out the intent of the M.P.S. (Section 63(3) of the **Planning Act**). The Board is therefore unable to determine the decision of Council cannot reasonably be said to carry out the intent of the M.P.S. The Board saying that, referring to Section 63(5) of the **Planning Act**, is unable to allow the appeal.

Under Section 29 of the **Municipal Board Act**, the Board therefore dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 18th day of December, A.D., 1989.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

BARRIE v. PROVINCIAL DIRECTOR OF PLANNING ET AL

PLANNING - REGIONAL DEVELOPMENT PERMIT - PARTICULAR LOCATIONAL NEED OR ADVANTAGE - OYSTER HATCHERY - PERSON AGGRIEVED - EXPERT WITNESSES - PLANNING ACT, S. 111, HALIFAX-DARTMOUTH REGIONAL DEVELOPMENT PLAN POLICIES 4B, 12B AND REGULATION 27.

This is an appeal from the granting of a regional development permit for an aquaculture support facility in McGrath's Cove. The applicant ran an oyster and mussel business and wished to establish an oyster hatchery and mussel declumper. Access to property was by an unpaved private right-of-way that was used by local residents.

HELD: The appeal was allowed and the regional development permit was revoked.

A person who owns adjacent property and shares the use of a private road is a "person aggrieved by the granting of a regional development permit".

A person with the necessary planning qualifications may give opinion evidence but if he has no experience with the particular plan his opinion may be given less weight.

The HDRDP places a duty on the Provincial Director to ensure that all appropriate Government departments are aware of the request for a permit.

A condition restricting the number of employees is not in conformity with the Plan. This would restrict the growth of business.

Regulation 27 of the HDRDP does not override the other requirements of the Plan. Policy 4B deals with selecting or evaluating an industrial site. Policy 12B deals with evaluating a particular application. To place an industrial site within or in close proximity to a largely residential community is not within the intent of the Plan.

The Provincial Director must give full consideration to the traffic generated and consider the road conditions and access to and from the public road and nearest regional highway.

The use of a checklist format is to ensure that the Director reviewed the proposed development against the Plan and expressed his opinion on each topic.

NSMB-26-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **MICHAEL BARRIE, CATHY MARTIN and BLIND BAY PROPERTY OWNERS ASSOCIATION** from the granting of a regional development permit by the Provincial Director of Planning issued July 26, 1989, respecting property located at Lot A-1, Kent C. Hurley Subdivision, McGrath's Cove, Halifax County, for an Aquaculture Support Facility on the application of **GRAHAM JOHNSON/OSTRED SEA FARMS LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: MICHAEL WOOD, LL.B., and BRIAN SHARP, LL.B., for the Appellant, Michael Barrie;

PETER DARLING, LL.B., and STEPHEN COYLE, Articled Clerk, for the Applicant, Graham Johnson/Ostred Sea Farms Ltd.;

WILLIAM WILSON, LL.B., and CHRISTINE McCULLOCH for the Director of Planning.

HEARING DATES: October 26, 1989;
October 27, 1989;
November 14, 1989;
November 15, 1989;
November 22, 1989;
November 23, 1989.

DECISION DATE: December 19, 1989.

DECISION: **Appeal Allowed.**

DECISION

This is an appeal from the granting of a regional development permit under the Halifax Dartmouth Regional Development Plan. The permit allows Graham Johnson/Ostred Sea Farms to proceed with the development of an Aquaculture Support Facility on property in McGrath's Cove.

McGrath's Cove is a small community located approximately 40 kilometers south-west of Halifax. The community is divided into the east and west sides. The subject property is on the east side. Land access to the community is from Highway 333 along McGrath's Cove Road. The east side of McGrath's Cove is served by the Scott's Road which branches off from McGrath's Cove Road.

The lands on the east side of McGrath's Cove were owned at one time by a Mr. Scott. Mr. Scott divided the land into three sections for his children, Bruce, Clifford and Nell. The section closest to McGrath's Cove Road was given to Bruce Scott who has since subdivided some of the land among his children.

Clifford Scott received the middle section of the land. He has subdivided it among some of his children while retaining a large portion which abuts the subject property.

The third section was given to Mr. Scott's daughter Nell Foran. This section is the furthest from McGrath's Cove Road and can be described as the headlands of the east side of McGrath's Cove. Mrs. Foran sold a large portion of her land to Kent Hurley.

Mr. Hurley subdivided his land into four lots. Each lot has water frontage. Lot A1, the subject property was the remainder lot containing approximately 15 acres. It is unclear why Lot A1 was not further subdivided at the time. Under present law it cannot be subdivided.

Although homes have been built on each of the lots except Lot A1, the land has been left generally in a natural vegetation state. Access to the four Hurley lots is by way of a series of rights-of-way to a common parking lot. These rights-of-way connect to a right-of-way across the remaining Foran property and eventually join the paved portion of Scott's Road.

Scott's Road is a paved public road for part of its length. The balance of Scott's Road consists of the unpaved 15-foot rights-of-way. Both the paved and unpaved portions of Scott's Road have many curves and steep grades. Although the speed, is not posted, it is dangerous to drive above 15 - 20 kilometers per hour on Scott's Road.

There are no sidewalks on Scott's Road. In order to catch the schoolbus, local children must walk along Scott's Road to the intersection with McGrath's Cove Road. The schoolbus is not driven on Scott's Road. As there is very little flat land in McGrath's Cove, the children sometimes play on the Scott's Road.

While it is likely that McGrath's Cove began as a fishing village, today there are only three active commercial fishermen working out of the east side of the Cove. Many of the residents of the east side of the Cove are descendants of the Scotts. They wish to live in the community. They do not work in the fishing industry. There are 3 active fishing wharves, some fishing sheds and a refrigeration unit on the east side of the Cove. Bruce Scott has a slip for use with Charter Tours but he does not run these charters frequently.

Graham Johnson, the Applicant, came to McGrath's Cove area in 1981. He obtained a Federal oyster lease in the Narrows, a body of water in close proximity to the east side of McGrath's Cove, particularly to Lot A1.

While a student at Dalhousie University, Mr. Johnson became interested in aquaculture and in particular the production of European oysters. He became involved in an oyster development project at the University in 1980. He continued with it until 1986.

In 1981 he and his wife set up Ostred Sea Farms as a proprietorship. He obtained the lease in the Narrows from the Federal Government. He bought oyster seed from the University and other sources and began the business. The business grew each year. Eventually Mr. Johnson's wife decided to pursue a medical career and Mr. Johnson ran the business on his own. In 1986 he left Dalhousie and incorporated the company. The business expanded to include mussels and rainbow trout.

When Mr. Johnson first began using the Narrows he asked for and was granted permission to use Doug Scott's wharf on the east side of McGrath's Cove. He also for a time obtained access from Nell Foran's property.

In 1983 Mr. Johnson and his wife purchased Lot A1.

They intended to build both a home and an oyster hatchery on the property. Mr. Johnson made inquiries about municipal zoning and learned that it was zoned General Building Zone under Halifax County's Zoning By-law 24. He said he was not aware then that he required a regional development permit.

One of the reasons for purchasing the land was that the quality of the nearby water was excellent for a hatchery. In addition, Lot A1 was handy to the Narrows.

After purchasing the land, Mr. Johnson continued to use other wharves to access his oyster lease since it was difficult to move product in and out of Lot A1. The only access was a path from the common parking lot. During the summer of 1989, Mr. Johnson built a driveway from the unpaved portion of the Scott's Road to the water's edge on his property.

In 1987 Mr. Johnson began trucking oysters from Cape Breton to McGrath's Cove. These oysters were put on lines in the Narrows in a "finishing off" process to make them marketable. This process can take up to one year. The oysters are brought down in an 18-wheeler. The vehicle is parked at Bayside for unloading on small vans for transportation to the subject property. At present, an 18-wheeler cannot drive onto the subject property. Mr. Stairs, an employee of the Applicant, suggested that once the new driveway is completed that the 18-wheeler could be driven into the site. Mr. Johnson denies that he intends to do this.

Mr. Johnson, in the fall of 1987, applied to the County of Halifax, for a building permit for what was described as a "Fish Packing Facility". He sought the necessary approvals from the various government departments.

The Department of Transportation returned his application for Minister's Consent for Building and Access to Property on October 15, 1987 stating that the "Department of Transportation does not issue permits for access or construction of dwellings on Private Roads".

The Department of Health issued a permit for an on-site sewage disposal system for Lot A1 on December 2, 1987. The permit states that it expires twelve months from the date of issue. There is no evidence before the Board that the permit was ever renewed.

The Fire Marshall's Office did not give its approval until September 20, 1988.

In either late December, 1988, or early January, 1989, Paul Christian of the Department of Municipal Affairs contacted Mr. Johnson and advised him, he required a Regional Development Permit.

The Appeal Record contains one letter from the Department of the Environment dated June 26, 1989. The Board understands that Mr. Johnson was required to obtain that Department's approval before the Provincial Director could issue the regional development permit. The exchange of letters between Mr. Johnson and the Department were not given to the Provincial Director and as a result were not included in the

Appeal Record, although some of the correspondence was introduced as evidence.

The June 26, 1989 letter from F.C. MacNeil, Environmental Engineer states in part:

> "As indicated in your letter of June 15, 1989, you will not be processing finfish at the proposed facility. Consequently the operation will now consist of the following:
>
> - Mussel declumping (5,000 - 10,000 lb/wk)
> - Oyster hatchery (5,000 - 50,000 oysters/wk)
>
> Based on this information, the issuing of an industrial waste permit is not required under the Act."

The other exhibits include a letter from the Chairman of the Nova Scotia Environmental Control Council to the Honourable John Leefe, Minister of the Environment outlining the Council's recommendations re Ostred Sea Farms. There is also a letter from Mr. Leefe to the local M.L.A. attaching the Chairman's letter. Both these letters note that there was opposition from local residents to the proposed developments.

At some point Mr. Christian discussed the application with Ron Simpson, Provincial Director of Planning. They visited the site. They asked Mr. Johnson to send a letter indicating what the current proposal was. Mr. Johnson's letter is dated July 20, 1989.

On July 26, 1989, Mr. Simpson issued the Regional Development Permit. The development is described as:

> "Aquaculture Support Facility as per Building Permit No. 85402".

The permit further states:

> "This permit is issued only for the development as described in the attached letter from Mr. Graham Johnson, Ostred Sea Farms Ltd., dated July 20, 1989."

Mr. Johnson and his wife have decided not to build a home on Lot Al. Dr. Johnson now has a family/obstetrics practice in Hatchett's Lake and McGrath's Cove is too far away.

This decision not to reside in McGrath's Cove particularly concerns the residents who are opposed to the development.

Don Roscoe, the owner of adjacent property, designed the plans for the proposed plant. He has been a supporter of Graham Johnson and Ostred Sea Farms in its proposed development, and the development of aquaculture in general. At the Board's evening sitting, Mr. Roscoe came forward as an "interested person". He testified that given the Johnsons' decision not to reside in the community, he could no longer support the proposed development.

Perhaps because he perceived that residents of McGrath's Cove opposed the development, Mr. Johnson did attempt to find alternative sites. He pursued a Crown land site at Deep Cove near his mussel lines. His application went through a public hearing and was turned down.

Included in the Exhibits was a document prepared by Mr. Johnson responding to questions raised by the Biind Bay Community Association. The document is dated November 28, 1989. The Board understands that the document was prepared in conjunction with Mr. Johnson's attempt to obtain permission to use the Crown land site in Deep Cove. The document does make mention of the subject property. Of particular concern in this appeal is the following:

> "8. What are your intentions with respect to your property in McGrath's Cove?
>
> The property will remain privately owned by Graham Johnson. The land will be used to pull boats upon and work from when working on the lines in the narrows. There are no development plans for this property and future use will be of a personal nature."

The Board cannot reconcile this answer with the fact that Mr. Johnson was continuing to proceed with his application for the County building permit for Lot A1. On January 3, 1989 he applied for the Regional Development Permit.

When questioned, Mr. Johnson said his answer was given on the basis that the Deep Cove site would receive approval.

The Board was struck by the fact that Mr. Johnson does not always check on the legal requirements before moving ahead with his business activities. He hoped to obtain a mussel lease in Deep Cove by transfer. He proceeded to put mussel lines out and then found that he could not obtain the lease. At one time, Ostred had mussel lines in the waters off the Foran property without benefit of a lease.

It appears to the Board that Mr. Johnson generally tries out the aquaculture aspects first and then attempts to see what legal planning requirements are needed. It was certainly wise to determine whether or not oysters would grow in the

Narrows before purchasing land. It was best to find out if the water quality was good off Lot A1 before purchasing it. However, it is also necessary to ensure that all governmental requirements are met.

Mr. Johnson has taken time to analyze the business of aquaculture. He knows what is required and through his experience he has learned the best ways to grow mussels. The Board has no doubt that Mr. Johnson will be able to succeed in the business and it is likely that his business will grow. It appears likely to the Board that the seed which he produces in the hatchery will be of interest to others and that he may expand that aspect of the business in addition to producing a greater quantity of mature oysters and mussels for market. If he installs a mussel declumper he may attract business from mussel growers who do not have a declumper.

Initially Mr. Johnson wanted to include a finfish operation in his proposed development in McGrath's Cove. This aspect of the proposed development met with opposition from the Department of the Environment, as well as others. Mr. Johnson operates a separate finfish plant at Bayside and plans to continue to do so. It is not feasible to use the finfish plant for the development proposed for McGrath's Cove.

The Appellants, Michael Barrie, Cathy Martin and the Blind Bay Property Owners Association each filed a separate Notice of Appeal on August 4, 1989. Prior to the commencement of the hearing, the solicitor for the Applicant challenged the

Appellants' standing. He argued that they were not persons "aggrieved" within the meaning of Section 111(11) of the **Planning Act**. The Board heard evidence on the issue. The Board held that Michael Barrie was a "person aggrieved by the granting of a regional development permit". Mr. Barrie owns adjacent property and shares the use of the private road with the Applicant and others.

Cathy Martin withdrew her appeal. The Blind Bay Property Owners Association were not represented. The Board determined that, in the absence of evidence, the Association was not a "person aggrieved" within the meaning of Section 111(11).

The Appellant called Donald Mason as a witness and asked that the Board find him qualified to give opinion evidence in engineering and in planning, specifically with reference to the Halifax Dartmouth Regional Development Plan. Mr. Wilson, solicitor for the Director, argued that Mr. Mason did not have experience with the Halifax Dartmouth Regional Development Plan and despite his expertise in planning matters he was not qualified to give opinion evidence with respect to the Regional Development Plan.

The Board was not prepared to rule on this matter at the time it was raised. In order to expedite the hearing and with the consent of all parties, Mr. Mason was permitted to express his opinions. The Board reserved its right to determine Mr. Mason's expertise.

As a rule, the Board has qualified persons with planning education and/or experience in the planning field to give opinion evidence with respect to municipal planning strategies. The Board has not distinguished between a person who had worked with a specific planning strategy and an outside expert. No one previously raised this issue. While a Regional Development Plan is not the same as a municipal planning strategy, the same considerations as to the admissibility of opinion evidence should apply.

The Board adopted much of its procedures from its predecessor, the Provincial Planning Appeal Board. When the PPAB started most municipalities did not have municipal development plans in effect. Appeals were from Council decisions under zoning by-laws. The test was similar to that under Section 63(6) of the **Planning Act** - was the decision "inconsistent with or unnecessary for the protection of the best interests of the municipality". Planning experts were permitted to give their opinion based on planning considerations.

With the adoption of municipal development plans and subsequently municipal planning strategies, these planning experts were permitted to give opinion evidence as to whether or not specific policies in the plan were or were not complied with. The Board made no distinction between those experts who had experience with a specific plan and those that had not.

The Halifax Dartmouth Regional Development Plan lacks clarity of definition. It contains various terms which have specific planning connotations. An expert in planning matters is in a position to shed light on the meaning of the Plan. Where parties disagree with the interpretation of one expert, they are entitled to call their own expert. They can argue that the Board should interpret the wording differently.

The Board does not believe that it can single out a regional development plan and treat experts testifying about it differently than experts analyzing a municipal planning strategy.

Despite similarities each municipal planning strategy is unique. There is merit in Mr. Wilson's argument that a person who has not made applications under a plan should not be permitted to give opinion evidence unless that person has done extensive study of various plans and can establish a familiarity with the plan in question.

The Municipal Board does not restrict the giving of opinions to experts. The **Municipal Board Act** encourages interested persons to attend the Board hearings and express their opinions on proposed developments. Board hearings are not the same as courtroom trials. Often in planning matters, the facts before the Board are not in dispute. The Baord often has only to balance various criteria in analysing those facts. The Board does not believe that it is consistent to say that a qualified person cannot express his opinion while permitting any interested person to do so.

The Board does recognize that there is a danger in relying on the opinion of an expert who has little experience with a particular plan. This problem can be addressed in weighing the opinion evidence of the expert.

In Wallace v. Town of Truro (1988) 7-B M.B.D. 315, the Board raised concern about the weight that should be given to the evidence of planning experts as to the interpretation of the various policies of the relevant plan. In that case, all counsel were of the view that the Board was to make its own interpretation of the policies taking into account the opinions of the experts.

Often the Board balances conflicting expert planning opinion in reaching a decision. There are, however, cases in which no planning experts testify before the Board.

In the past, the Board has on occasion relied on the uncontradicted expert evidence before it. The Board will continue to permit a person with the necessary planning qualifications to give opinion evidence. It reserves the right to weigh all the evidence. If the person giving an expert opinion concerning a plan has never before used and has not thoroughly studied the plan, the Board will consider these facts when weighing his opinion.

The Board, therefore, admits Donald Mason's opinions with respect to the Halifax/Dartmouth Regional Development Plan. The Board places lesser weight on them because of his lack of experience with this Plan.

In any event, it is the Board's duty to make its own interpretation of the Halifax Dartmouth Regional Development Plan using the evidence presented to assist it.

Section 111(11) of the **Planning Act** provides for an appeal to the Board from the granting of a regional development permit. The subsection does not specify any criteria for the Board to consider in deciding whether or not to allow the appeal. However, subsection (8) of Section 111 provides that no development permit shall be issued that is inconsistent with the Regional Development Plan. Both the Board and its predecessor, the Provincial Planning Appeal Board, have used a test of inconsistency with the Regional Development Plan in deciding appeals dealing with the granting of regional development permits.

Waverley Ratepayers Association v. Director of Community Planning (1976), 6 P.A.D. 663 was the first appeal from the granting of a regional development permit. The appeal was under Section 7(1) of the 1969 **Planning Act** but the wording is similar to the present section 111(11).

In the Waverley Ratepayers's case the Provincial Planning Appeal Board determined as follows at pages 693 - 694:

> "The Board, if it is to allow the Appeal, must satisfy itself that the issuing of the Regional Development Permit is in violation of the policies, goals, objectives and regulations of the Regional Plan. In determining whether or not to issue a Regional Development Permit, the Director is obliged to consider the 17 criteria set forth on page 50 of the Regional Development Plan. The Director must not issue a Regional Development Permit unless he is presented with evidence to his satisfaction that all statutory requirements of the Department of Public Health, the Department of Environment and the Department of Highways and all municipal requirements have been complied with under Section 28 of the Regional Plan. Furthermore, the Director under Section 29 must not issue a Regional Permit if the proposed development

> adversely affects the "arterial road and highway system as shown on Map III" of the Regional Plan.
>
> The issue in this Appeal is whether or not the granting of the Permit by the Director conflicts with the Regional Development Plan."

The Provincial Planning Appeal Board suggested a procedure for the Director to follow in considering whether or not to issue a regional development permit in the Waverley Ratepayers case as follows at pages 696 - 697:

> "As this is the first Appeal to the Board from the granting of a Regional Development Permit under the provisions of Section 7(1) of the Planning Act, and as the Director's evidence was that he receives approximately two thousand (2000) applications for Regional Development Permits each year and, combined with the evidence of Mr. John Leedham which indicated that the Director did not have an established procedural check list, the Board therefore suggests that a procedural check list for the granting of Regional Development Permits under the Halifax-Dartmouth Regional Development Plan be set up along the following lines:
>
> 1. A check should first be made to determine whether or not the lands in question are within the "Planning Region" as outlined in red on Map I of the Regional Plan;
>
> 2. Reference should then be made to the general controls section of the Regional Plan (Regulations 28-32).
>
> At this point the Director should receive satisfactory evidence from the Department of Public Health, Department of Environment and the Department of Highways that the proposed development has complied with their requirements. The Director should also receive from the Municipal unit involved evidence indicating that the proposed development has complied with all their municipal requirements. A check should then be done on Map II, Appendix "C" and a check done on Map II, Appendix "D" to determine whether or not the development offends against the seven "Regional Park" designations and/or the proposed Transportation Network System.

> 3. Next, one should consider whether or not the lands in question are within or without the development boundary as defined by the Regional Plan.
>
> 4. A consideration of those portions of the Regional Development Plan dealing with lands that are situate within the development boundary (Sections 12 - 20) or with lands that are situate without the development boundary (Sections 21 - 27) as the case may be, should then be made.
>
> 5. The development in question should be checked for conformity with the policies, objectives, goals and regulations of the Regional Plan. At his stage, all of the 17 criteria set forth in Section 12(B) of the Regional Plan _must_ be used by the Director in determining whether or not to issue a Regional Development Permit.
>
> 6. Finally, the Director should pay particular attention to the provisions of the General Controls set out in Sections 28 and 29 of the Regulations in the Regional Plan."

Shatford et al v. _Director of Planning_ (1984), 3-B M.B.D. 161, usually referred to as the _Ocean Farmers_ case, deals with an appeal from the granting of a regional development permit for a fish plant in a residential neighbourhood. The case again involved Section 7(1) and the Board referred to the _Waverley Ratepayers_ case. The Board found at page 168 of the _Ocean Farmers_ case:

> "the sole issue to be determined by the Board is whether the proposed development conforms to the Halifax-Dartmouth Regional Development (HDRD) Plan."

> The Board went on at page 193 as follows:
>
> "S.s. (7) of Section 5 of the Planning Act, Statutes of Nova Scotia c. 16 states that "no development permit shall be issued inconsistent with the Regional Development Plan". The Board's duty then in this case is to determine whether or not the permit issued by the

> Director to Ocean Farmers was issued "inconsistent with the regional development plan".
>
> The Board is of the opinion that there is an onus on the Appellants to establish that the decision of the Director to issue the permit in question is inconsistent with the Regional Development Plan."

The Board in Ocean Farmers rejected the submission of counsel for the Director that the Appellants must show that the proposed development is "prohibited" by the provisions of the Plan. The Board stated at page 194:

> "In the opinion of the Board a proposed development may not be actually "prohibited" by the Plan but may nevertheless be "inconsistent" with the Plan when a proposal is examined in the light of the Plan as a whole".

Both Waverley Ratepayers and Ocean Farmers concerned the Halifax/Dartmouth Regional Plan which is also the subject of this appeal.

The Halifax/Dartmouth Regional Plan consists of 10 Goals, 12 Objectives with Supporting Policies, 34 Control Regulations and Appendices. There is also an Introduction and Analysis. Included in the Appendices is a "Prescription" by the Minister of Municipal Affairs exempting certain developments from a Regional Development Permit.

The Goals which appear relevant to the Board in this appeal are as follows:

> "2. To have an orderly pattern of development in the Region.
>
> 6. To have development which imparts a strong sense of community and respect for the natural environment."

The relevant Objectives in the Board's opinion are as follows:

> "1(A) To provide a framework for development that will encourage the orderly expansion of the Region, control the urban form so as to optimize public expenditures, foster and encourage stabilization of existing neighbourhoods, and maintain a high quality urban environment.
>
> 2(A) To control urban sprawl outside the development boundary to encourage a strong urban, rural and village definition, to more effectively provide services and to protect the rural environment.
>
> 4(A) To provide sufficient land to accommodate the industrial and service growth in the Region.
>
> 12(A) To establish guidelines for issuing regional development permits and for the imposition of conditions thereupon."

The following Policies are particularly relevant:

> "4(B) ...
>
> Notwithstanding the policy above, industries related to particular resources or having particular locational needs may be permitted throughout the Region,...
>
> Industrial and commercial sites shall be selected or evaluated on the basis of the following criteria:
>
> - Proximity to regional transportation facilities such as rail, major highways or airports,
> - Relatively flat sites with good surface drainage,
> - Favourable soil conditions,
> - Compatibility of adjacent development and facilities,
> - Availability of utilities and proximity to trunk sewer and water lines,
> - Shape and size of site, including room for expansion,
> - Road systems discouraging penetration into residential areas,
> - Large available acreage with a minimum size of 100

acres for industrial parks.

12(B) The following criteria shall be used by the Director of Community Planning or the development officer of a District Planning Commission (where applicable) in determining whether or not to issue regional development permits upon a particular application or whether to issue same upon conditions:

1. Conformity of the proposed development with the policies and provisions of the Halifax-Dartmouth Regional Development Plan;

2. Adequacy of community facilities and services as related to the proposed development;

3. Compatibility with existing or proposed development in the adjacent area;

4. Orderliness and economic viability of development pattern;

5. Compatibility with historic sites and villages scenic views and vistas;

6. Degree of access of the general public to shorelines, waterfronts and community facilities;

7. Location and intensity of the development in relation to the development boundary;

8. Lack of nuisance factors in or near the proposed development, including swamps, bogs, marshes, flood-plains, transmission lines, major transformer stations, treatment plants and obnoxious or unsightly land uses;

9. Suitability of the proposed development for building purposes;

10. Potential impact from traffic generated by the proposed development on the arterial and regional tansportation network;

11. The availability of transit and commuter services to the propsoed development;

12. The use of buffering, landscaping, screening and access control to reduce potential incompatibility from adjacent land uses and facilities, and traffic arteries and to protect natural features from ecological damage;

13. Adequacy of on-site development features including parking, landscaping, provision of recreation space and related facilities, building height and bulk, setbacks and siting of buildings, vehicular manoeuverability and sign control;

14. Impact upon natural environmental process of the proposed development upon the advice of the Department of the Environment;

15. Impact of the development in relation to the extent of public expenditures necessitated by the development;

16. Feasibility of extending sewer and water lines to the proposed development, and,

17. Adequacy of access points to and from the proposed development in terms of number, location, spacing, site distances and their ability to accommodate anticipated traffic loads;" (Note although this clause ends with a semi-colon there are no other criteria listed.)

The Regulations are divided into several sections. Regulation 27 in the section dealing with Lands Outside the Development Boundary and Regulation 28 in the section entitled General Controls are the most relevant to this appeal. They read as follows:

> "27. Notwithstanding any other provisions of these Regulations, a regional permit may be issued for development in industrial parks outside the development boundary if the minimum size of the industrial park is 100 acres or for industrial developments outside the development boundary which have a particular locational advantage or need.
>
> 28. Notwithstanding the foregoing paragraphs, no regional development permit shall be issued unless the director of Community Planning or the development officer of the District Planning Commission (where applicable) is presented with evidence to his satisfaction that all statutory requirements of the Department of Public Health and the Department of the Environment with respect to septic tanks, sewage

> treatment plants, water supply and other health and environmental matters and of the Department of Highways with respect to highway approvals and that all municipal requirements have been complied with."

The Minister of Municipal Affairs has exempted from a Regional Development Permit developments for:

> "(18) Uses directly related to the fishing industry but not including uses for the processing of fish."

Some basic principles emerge from the Plan. Development is to be orderly without urban sprawl. Existing neighbourhoods are to be stabilized. The Plan permits industrial uses, preferrably in large industrial parks. Where an industry has a particular locational need, it may be permitted outside an industrial park. Traditional fishing uses do not require a regional development permit.

It should be noted that at the time of the Waverley Ratepayers case, the Provincial Director of Planning was receiving 2,000 applications per year for a regional development permit. The present Provincial Director, Mr. Simpson, testified that now the number of applications is "12 or so a year".

The Provincial Director in processing the present application has acted upon one recommendation of the Provincial Planning Appeal Board. He used a form headed "Procedural Check List for the Granting of Regional Development Permits under the Halifax-Dartmouth Regional Development Plan" in carrying out his evaluation. The Board feels that the Provincial Planning Appeal Board in recommending a checklist meant a checklist format to make sure the Director remembered to evaluate all the relevant concerns about the application. The PPAB did not envisage its suggested checklist as being only a simplistic inventory to be marked off "yes", "no" or "n/a". The PPAB meant to ensure, before granting a regional development permit, the Director reviewed the proposed development against the Plan and expressed his considered opinion on each topic listed.

Other "checklists" used in planning matters, discuss the various criteria. The Provincial Director's checklist form lacks space to write out reasoned comments about the various matters listed. As used by the Director, the checklist takes him personally through the process on the basis of a verbal report from staff. He does not decide on a detail written report from his staff.

The checklist contained in the Appeal Record is undated and unsigned. From the evidence, it appears that Mr. Simpson completed the checklist.

The checklist in this case has certain criteria marked "not applicable". This appears contrary to the wording of the Regional Development Plan and the clear direction from the Board in the Waverley Ratepayers case. The Provincial Director is required to consider every criterion. He may conclude that certain of the criteria do not impact adversely even though they are not complied with. This should be spelled out. For example it is improper to state that the criterion "relatively flat site with good drainage" is not applicable. Mr. Simpson testified that he believed that the design of the proposed building did not require relatively flat land. He said he was satisfied there would be adequate drainage. He should have noted this on the checklist instead of stating that it was not applicable.

There are six criteria under site evaluation and two criteria to be considered before issuing a regional development permit which have been marked "n/a". On the evidence the Board feels Mr. Simpson did direct his mind to each of these criteria before deciding they were "not applicable".

The evidence shows the Director did not directly seek necessary information from relevant agencies. The practice followed was to require the Applicant to make the contact and provide the Provincial Director evidence that all requirements of the various agencies have been met. This practice, without independent verification by the Director, concerns the Board.

The Provincial Director has not acted upon the suggestion of the Municipal Board in Ocean Farmers that he prepared a suitable form which he could submit to the Departments of the Environment, Health and Fitness and Transportation to determine if all the statutory requirements of these Departments had been met. Mr. Simpson testified that some discussion had taken place with officials of the Departments but that no form had been agreed upon because the officials were not prepared to "sign off" in any final manner in respect of specific proposals.

While it may not have been possible to agree upon a suitable form, there is no excuse for the Director not to at least send an inquiry to each Department requesting a response before issuing the permit. Given that there are only 12 applications a year, the Director could have done this. Planning staff in the Municipalities must write to the various Departments for Departmental evaluations of specific proposals. They receive some response even though the responses are not always as detailed as they should be.

The Board considers that the Halifax-Dartmouth Regional Development Plan places a duty on the Provincial Director to ensure that all the appropriate Departments are aware of the request for a regional development permit. He must ensure every Department has an opportunity to make its views known to the Director prior to granting a permit. In this case, the Director relied on the Applicant to produce letters from the Departments that they were satisfied. In some cases copies of the Applicant's letters to the Departments were not given to the Director. This raises a concern as to the information which the Department relied on in making its response.

The Board notes that both the letter from the Department of Transportation and the permit from the Department of Health were issued more than a year and a half before Mr. Simpson granted the regional development permit. The Department of Health permit for on site sewage disposal expired six months before the regional development permit was granted.

The Board notes the failure of the Director to make inquiry to the Department of the Environment of the impact upon the natural environmental process of the proposed development. The Board in Ocean Farmers relied in part on this criterion in concluding that the permit granted was inconsistent with the Regional Plan. A letter to the Applicant from an Departmental Official saying an industrial waste permit was not required fails to satisfy the Plan's requirement for the Director to consider "upon the advice of the Department of the Environment", the impact of the proposal upon the natural environmental process.

The Board does not think the letter from the Department of the Environment necessarily satisfies Regulation 28. The letter from Mr. MacNeil to the Applicant, quoted at pages 6-7 in this decision, specifically limits the activities which should take place at McGrath's Cove. Mr. Johnson's letter (attached as a condition to the permit) is not similarly limited to mussel declumping and oyster hatchery.

Other than obtaining a copy of the Building Permit application, the Provincial Director did not correspond with officials of the County of Halifax.

The Board does not like the method adopted by the Provincial Director for imposing conditions in a permit. Subsection (7) of Section 111 provides for attaching "such conditions to ensure conformity with the Regional Development Plan as may be determined by the Director". In this case the Provincial Director asked for a letter from Mr. Johnson outlining his proposed operation. He attached this letter to the permit.

He called it a condition. The Board feels Mr. Johnson's letter lacked the precision to constitute conditions clear enough to ensure conformity with the Plan.

As a general practice, the Provincial Director should draft the conditions himself. Once he received Mr. Johnson's letter, Mr. Simpson needed to review it, determine what conditions were necessary to ensure conformity with the Plan and set those conditions out clearly.

Mr. Johnson's letter does not make clear what conditions, if any, are placed on the proposed development. For example there is reference to "light weekend work" requiring "usually one person for half a day". Can this be interpreted as a condition that no more than one person will attend at the site for no more than half a day on any weekend. What happens if it is found that more than one person and more than a half day is required? There are other references to the number of employees and that at peak times there would be 8 cars. Does this mean that Mr. Johnson cannot expand his business and hire more people without applying for a new regional development permit? The answer is unclear.

During the course of argument, Mr. Darling stated that Mr. Johnson would agree to the Board attaching a number of conditions to the permit. In summary the proposed conditions are as follows:

- never more than 8 employees;
- no deliveries between 7:00 p.m. and 7:a.m.;

- no larger trucks than a 5-ton cube van to visit the site other than for fuel delivery;
- building will be located where indicated in testimony;
- the number of holding tanks to be limited to 10 and to be located immediately adjacent to the building.

Regulation 5 of the Plan states that a permit may be subject to conditions but gives no guidance as to nature of the conditions.

Section 111(7) of the **Planning Act** is limited to conditions that ensure conformity with the Plan.

Objective 4 of the Plan deals with providing sufficient land to accommodate industrial growth. The concluding paragraph in the Policy section reads as follows:

> "Industrial development shall be subject to performance standards to assure control over obnoxious effects, to control open storage, to assure enjoyment of adjacent properties, and to assure a high level of design."

The Regulations make no reference to performance standards. It may be, as suggested by Mr. Darling, that these performance standards are set by imposing conditions on the permit.

Do the proposed conditions qualify as performance standards? The limit on the number of storage tanks does. The limit on the hours of delivery does not assure enjoyment of adjacent properties. The very hours during which Mr. Johnson wishes to operate are the same hours during which the children travel along the road to and from the schoolbus and play on the road and the other residents are also using the road. Except for possible noise and the effect of headlights on the properties close to the road, it is likely that if the hours were reversed and all work was done at the plant between 7:00 p.m. and 7:00 a.m., some of the traffic concerns of the residents would be alleviated although the dangerous conditions of the road would be enhanced without street lights.

The Board does not believe the proposed condition limiting the number of employees, is in conformity with the Plan. This would result in a restriction on the growth of the business.

In Atlantic Shopping Centres Ltd. et al v. Regional Director and Burnac Leaseholds Ltd. (1982), 12 P.A.D. 1811 the Provincial Planning Appeal Board was not prepared to find that the Plan's purpose was to deny one's right to engage in business without clear and unambiguous language in the legislation.

The physical size of the proposed building will, of course, place limits on the number of persons who can work in the building. The Applicant would have to apply for a new permit if he wished to build a new building. The Board does not believe that aside from building size limitations, hours of operation and limits on the number of parking spaces that the Provincial Director or the Board can impose a direct limit on the number of employees or the size of the business. Clear and unambiguous legislative language is not here to support such conditions. Performance standards do not, in the Board's opinion, include the regulation of the number of employees.

The Board wishes to comment on the actual permit which was issued. The format used corresponds with the one included in Appendix "A" of the Halifax-Dartmouth Regional Development Plan. The permit states that it "expires six months from the date of issue". No reference is made to Section 111(10) of the **Planning Act** which states:

> "(10) No regional development permit issued under this Section shall grant authority to undertake a development until the time for appeal in subsection (11) has expired, or the appeal has been disposed of, whichever is the later."

The date of issue of this permit is July 26, 1989. The permit will expire on January 26, 1989. In the Board's opinion, to comply with Section 111(10), the permit should state that the permit does not take effect until the time for appeal has expired or the appeal has been disposed of whichever is later.

The permit also makes reference to Building Permit No. 85402 which refers to a "fish packing facility". While this may seem a picky point, Mr. Johnson changed the application in mid-stream and the other elements should also be changed.

As noted earlier in this decision, the Provincial Planning Appeal Board in Waverley Ratepayers stated that the Provincial Director must consider all 17 criteria in Policy 12B in determining whether or not to grant a Regional Development Permit. It is the Applicant's position, however, that Regulation 27 which permits an industrial use in a particular location overrides the other requirements of the Plan. Mr.

Darling suggests that since Mr. Johnson/Ostred Sea Farms has a particular locational need and the subject property having proper water quality gives a particular locational advantage, this fact overrides the rest of the Plan and is the determining factor in the issuance of a Regional Development Permit.

The Board does not interpret Regulation 27 in that way. Regulation 27 does override Regulation 21 which limits the issuance of regional development permits for lands outside the development boundary. It also permits consideration of an industrial use outside an industrial park where there is a particular locational advantage or need.

The subject property must still comply with the rest of the Regional Development Plan, particularly the criteria set out in Policies 4B and 12B.

The Board does not intend to discuss in detail all the criteria in Policies 4B and 12B. The criteria in Policy 4B deals with selecting or evaluating an industrial or commercial site. The criteria in Policy 12B deals with evaluating a particular application.

In evaluating the subject property under Policy 4B, it is clear that it does not meet most of the criteria. It is not in close proximity to regional transportation facilities. The land is not in proximity to trunk sewer and water lines. The road system does not discourage penetration into residential areas. 100 acres is not available. The issue of compatibility of adjacent development and facilities is questionable at best.

Except for the particular locational need and advantage which are not part of the specified criteria, it is difficult to understand on what basis the Provincial Director could have favourably evaluated the subject property as an industrial site. To place an industrial site within or in close proximity to a largely residential community does not fall within the intent of the Halifax-Dartmouth Regional Development Plan.

Policy 12B requires that the Provincial Director evaluate the particular proposal against 17 criteria. Of particular concern in this appeal are those criteria dealing with traffic, compatibility and impact upon the natural environmental process.

The Board notes, as well, that a number of the criteria cannot be met. There are no community facilities or services related to the development. There is no transit or commuter service available. It is not feasible to extend sewer and water lines to the site.

Much of the evidence and argument related to traffic concerns and whether or not these were matters that had to be considered in evaluating the proposed development.

Taking into account various criteria in Policy 12B and the requirement for approval from the Department of Transportation in Regulation 28, the Board feels the Provincial Director must give full consideration to the traffic generated. He must consider the road conditions and the access to and from both the public road and the nearest regional highway. In making this assessment, he should have seen the proposed development is located on a site which is accessed by a 15-foot unpaved right-of-way. The Plan does not disclose any intention of the Provincial Government to encourage industrial development on such a road.

It was argued that in assessing the acceptability of this road, the Board should take into account two factors. First, the existence of the fishing wharves and the traffic that is generated to and from them. These fishing wharves predate the existence of the Regional Development Plan. While a new shed or the refrigeration unit may have been installed since the Plan came into effect, that does not change much. The three fishermen who use the wharves reside in the community. They do not employ other persons. In addition, their fishing does not entail trucking in oysters as either seed or mature product.

Secondly, it is argued that the proposed development will not result in an increase of traffic from that which already exists. This argument is based on the assumption that Mr. Johnson does not require a regional development permit for his existing operation. The Minister's exemption is for uses directly related to the fishing industry but not including uses for the processing of fish. Based on the evidence presented the Board is not satisfied the trucking of oysters from Cape Breton to the site and then placing them in the water for "finishing off" qualifies for the exemption. In the Board's view, Mr. Johnson probably should have obtained a regional development permit in 1987 when he added this aspect to his operations.

Even if the Board is incorrect in its view that the finishing off of oysters is fish processing, the fact that there is existing traffic does not erase the need to evaluate the road system before granting a regional development permit. Even the paved portions of the Scott's Road are inadequate in terms of the grades, curves and sight stopping distances. The unpaved portion is worse. In addition the unpaved portion of the road is maintained by individual owners who will have to bear the cost of any repairs. The evidence suggests that Ostred Sea Farm's use of the road is greater than the other residents. There is no mechanism to force Ostred to assume the greater burden of maintaining it.

The Director must consider the lack of sidewalks. Children must use Scott's Road to reach the school bus. Since Mr. Simpson visited the site in the summer and did not speak to the residents, it is unlikely that he took this matter into account.

Several of the criteria deal with compatibility with adjacent development. The question of buffering is also raised. Mr. Simpson determined that with the possible exception of the Monroe home, none of the residents would be able to see the operation. It is to be located at the water side of a 15 acre site which has natural vegetation. Compatibility is not restricted to visual impact. The comings and goings of the employees and others visiting the site have an impact as well.

In this community, the neighbours do watch out for each other. The presence of strangers is noted. Given the isolated nature of some of the homes this is necessary. In addition, the road conditions dictate caution particularly if children are present. Once you pass the fishing wharves this is a residential community. The permits intrudes an industrial use into this settled residential area.

The Board has earlier in the decision mentioned its concerns about lack of advice from the Department of Environment on the natural environmental process. The Board has also noted the lack of information from the Government Departments and the Municipality as required by Regulation 28. Throughout the decision, the Board has noted many deficiencies in meeting the requirements of the Halifax-Dartmouth Regional Development Plan.

The failure by the Provincial Director to comply with the requirements of the Plan is a factor to be taken into account in determining whether or not to allow the appeal.

The Board recognizes that Mr. Johnson has developed a good business. His business will likely increase. This case is not about the advantages and disadvantages of aquaculture over the traditional fishery.

The Board believes that if access to the subject property was not through the Scott's Road, that there would be less reason to revoke the regional development permit. Given that access is through the Scott's Road, a serious question arises about the appropriateness of the Director granting this regional development permit.

The Board acknowledges that Mr. Johnson does not have alternative access and that he has spent a considerable amou constructing a driveway on his property. This was, of course, a risk on his part prior to the outcome of the appeal.

The Board, as noted above, is not prepared to find that the particular locational need or advantage that this site has can override all the other requirements of the Plan.

The Board has balanced the various factors and concludes that the granting of the regional development permit is not consistent with the Plan. The Board allows the appeal and revokes the regional development permit.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of December, A.D., 1989.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

LONG ET AL v. COUNTY OF CAPE BRETON and MacLEOD

PLANNING - REZONING - BEST INTERESTS OF THE MUNICIPALITY - R-1 AND A-2 TO C-1 AND C-2 TO PERMIT MOTEL AND CAMPGROUND - PLANNING ACT, S. 63(6).

This is an appeal by local residents from a rezoning of 15 acres in Middle Cape on the Bras D'Or Lakes for a motel and campground. Part of the property was previously used as a gravel pit. Opposition to the proposal centered on the interruption to quiet enjoyment of their property, traffic concerns, flooding and lack of adequate buffering. Planning staff recommended against the rezoning.

HELD: Appeal dismissed.

In assessing what is inconsistent with or unnecessary for the protection of the best interests of the municipality, decisions of Council and the Board become subjective and open to interpretation. Amending provisions in Zoning By-law recognize that needs, desires and attitudes of communities will undoubtedly be changed over time. Council was not acting in a manner inconsistent with or unnecessary for the best interests by not requiring regulatory approval before approving rezoning. Proposal was not very comprehensive and therefore difficult for staff to adequately assess. The majority of residents' concerns should be satisfied by the enforcement of regulatory requirements. Job creation and commercial development were considered by Council as prime factors in assessing the best interests. Consideration of the best interests of the municipality is not necessarily confined to one small segment of the municipality. The Board drew the inference that the decision of Council was, itself, a strong indication of what is in the best interests of the Municipality.

NSMB-16-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, by **JOHN LONG, ROGER MacMILLAN, MURIEL MacMILLAN, GARY WILSON, KAREN WILSON, DAVID MacKILLOP, JOHN NICKELO, JOHNNA NICKELO, ROY TURNBULL, FRANCIS TURNBULL, GORDON MacDONALD, CAROL MacDONALD, JOAN CORBETT, JOSEPH MacINNIS, MARY MacINNIS, MICHAEL O'SHEA, PAT O'SHEA, CHARLES DAKAI, TILLIE DAKAI, MARY DeWOLFE, MIKE MacPHERSON, BERTHA MacPHERSON, HAYES MacNEIL, AL MacNEIL, GREG NEARING, HARRY MacLEAN, MARY MacLEAN, FRED MYATT, CHARLENE MYATT, NORMA NEARING, DAVID MacINNIS, GEORGE MacINNIS, MARY MacINNIS, ANNIE MacINNIS, NICK DeWOLFE, IVAN SAMPSON, LLOYD MORGAN, EARL MORGAN, CHARLIE DONOVAN**, from a decision of the Council of the Municipality of the County of Cape Breton which rezoned property located at Middle Cape, Cape Breton County, from Residential R-1 and Agricultural A-2 to Commercial C-1 and C-2 on the application of **JOHN MacLEOD**.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: M. JOSEPH RIZZETTO, LL.B., on behalf of the Appellants;

ROBERT SAMPSON, LL.B., on behalf of the Applicant, John MacLeod;

DAVID N. MUISE, LL.B., on behalf of the Municipality of the County of Cape Breton.

HEARING DATES: **September 21, 1989;**
September 22, 1989.

BRIEFS SUBMITTED: **Appellant - October 3, 1989;**
Respondent - October 13, 1989;
Municipality - October 3, 1989;

DECISION DATE: **December 20, 1989.**

DECISION: **Appeal Dismissed.**

DECISION

On June 20, 1989, the Council for the Municipality ofthe County of Cape Breton gave approval to an application for a By-law amendment to rezone certain lands located in Middle Cape, Cape Breton County, from R-1, Residential and A-2 Agricultural to C-1 and C-2 Commercial. The rezoning would permit the operation of a motel and campground. The preliminary sketches provided indicated a 20-unit motel and a 200-unit campground for the rezoned area. The motel units would require a C-1 zoning and the campground a C-2 zoning. The proposal also included a swimming pool, water slide, marina and other recreational facilities.

The application for a by-law amendment was first given detailed consideration and approval by Council at a public hearing held at its meeting on May 16, 1989. Because of an error in advertising, it was necessary to repeat the public hearing for the rezoning application and consider the motion again. At a second public hearing held at the Council meeting of June 20, 1989, the amendment was again considered and approved.

On April 11, 1989, the Planning Advisory Committee (P.A.C.) discussed a Cape Breton Metro Planning Commission (CPMPC) Report dated April 5, 1989. This report recommended refusal of the rezoning. After discussion, the Committee recommended to Council to approve advertising a public hearing. Council approved this recommendation on April 18, 1989.

The proposed amendment was discussed in further detail by P.A.C. on May 9, 1989. At this informal public hearing Mr. Rizzetto spoke on behalf of a number of area residents who were opposed to the amendment. The Applicant, Mr. MacLeod, and Malcolm Gillis of the CBMPC also spoke at this meeting.

Councillor Handley moved that the P.A.C. recommend the amendment to Council for approval. This motion was defeated. The Minutes of the Meeting show that "the Chairman advised that the recommendation from this Committee would be going to Council on May 16, 1989..."

At both the May 16th, 1989, and the June 20, 1989, meetings of Council, a motion to reject the proposed amendment was first defeated. This was prior to giving final approval to the rezoning amendment.

On July 6, 1989, the Board received a Notice of Appeal concerning Council's decision of June 20, 1989.

The subject property is located in Middle Cape on Highway No. 4 between Sydney and St. Peter's. It is roughly rectangular in shape containing just under 15 acres of land. It is situated on the north side of the highway and runs approximately 1400 feet to the Bras D'Or Lakes. There is approximately 460 feet of water frontage on the Lakes. The survey plan shows a 40-foot wide common right-of-way through the middle of the property from the highway to the Lakes. There is a large brook which runs underneath the highway and cuts briefly across the southwest corner of the property. The brook eventually cuts back across the lower part of the property entering the Bras D'Or Lakes just past the northeastern corner of the property.

The upper two-thirds of the property had previously been used as a gravel pit. This excavation had removed the surface soil to the extent that the present surface is close to the top of the local water table. This section of the property is covered with low brush and alder bushes. The lower one-third of the property, through which the brook runs, remains in its natural wooded state. The beach at the Bras D'Or shoreline is of a small rock (large pebble) nature. Either the property itself or the immediately adjacent properties to the east and the west are heavily treed at the boundary lines. The brook which traverses the lower one-third of the property is subject to spring flooding. The highway, although relatively straight along the southern boundary of the property, is a downhill grade with a curve from either direction. This downhill grade and curve is more pronounced when approaching from the western side (St. Peter's).

Counsel for the Appellant called fourteen witnesses throughout the two day hearing. Five members of the public testified at the public portion of the hearing held the first evening. Counsel for the Applicant called two witnesses. No witnesses appeared on behalf of the Municipality.

Mr. Rizzetto, counsel for the Appellants, called Anna Steele, Peter Gouthro and Lawrence MacDonald, all employees of the Department of Environment for the Province of Nova Scotia.

The evidence of these three witnesses centered around the effects of the brook on the subject property, the highway, the Bras D'Or shoreline and the neighbouring properties. The testimony made specific reference to culvert sizes, relocation of the brook bed, floodplains and erosion.

Bill Bailey, an employee of the Nova Scotia Department of Health and Fitness gave evidence concerning the Department's involvement in the project. He reviewed his concerns relating to sewage disposal, water system designs and the results of their various test pits and perc tests. He indicated that the gravel pit excavation operation caused problems because of the removal of the fill so close to the local water table level. He stated that although he was not prepared to recommend the project with the land in its present state, the department was also not rejecting the plan at this time.

Thomas Hackett, for the Department of Transportation, reviewed his involvement with the project. His concern related to the appropriate sight distance requirements for an entrance to the property. A number of measurements had been made at different times. This resulted in a change in the proposed location of the entranceway to the property in order to meet the minimum sight distances. For further assurance and clarification the Applicant had cleared brush along the side of the highway prior to the most recent measurement which occurred the morning of this hearing. This measurement indicated that the proposed entrance still met the minimum requirements of the

Department for sight clearance.

The five people who testified in the public portion of the evening session, Charlene Myatt, Johnna Nickelo, Hayes MacNeil, David MacInnis and Michael MacPherson were all Appellants in this case. In addition, Mr. Rizzetto called Appellants John Long and Gary Wilson that evening. He called Fred Myatt the following morning. John Long and Charlene and Fred Myatt own the properties immediately adjacent to the subject lands.

All of these Appellants and other area residents testified why they opposed the rezoning. Their main concern was the interruption that the proposed project would cause to the quiet enjoyment of their property. They also referred to concerns of traffic problems at the entrance to the property; flooding problems caused by the brook; health hazards caused by the disposal problems inherent to the property's condition; lack of adequate buffering for neighbouring properties and policing of Bras D'Or shoreline.

At the evening session Mr. Rizzetto also called Ronald MacPhee and Anne MacIntyre. Mr. MacPhee is a resident of Ben Eoin where a campground is located. He gave evidence as to the negative effects of living near a campsite.

Ms. MacIntosh is Secretary of the Big Pond Community Council. She reviewed a letter which acknowledged that the Council was aware that all the residents of Middle Cape were opposed to the proposed development. She stated that the

Council was requested to provide a letter opposing the rezoning.

Malcolm Gillis gave evidence on behalf of the Appellant. Mr. Gillis is a Land Use Planner for the CBMPC. The CBMPC provides planning advice to the Municipality. Mr. Gillis reviewed his involvement in the application for rezoning commencing with the initial application through the preparation of the planning report to Council, to the present time. He was the author of the report. He detailed the reasons for recommending refusal of the application. The Board will deal with portions of Mr. Gillis' testimony later in this decision.

Harry Ryder, a Director of Acres Consulting located in Sydney, gave expert planning evidence on behalf of the Appellants. His concerns relate to the size of the project. He noted the relative impact on health and environment of a project like the one proposed. He testified that he believed extensive costs would be incurred in order to meet the necessary requirements to construct a project of the size planned.

Two Councillors also gave evidence. Mr. Rizzetto called Ivan Doncaster who for the past four years has been Councillor for District 11 which contains Middle Cape. He is a member of the P.A.C. Mr. Doncaster voted against the rezoning.

Mr. Sampson called John Coady from Bras D'Or. Councillor Coady is Deputy Warden for the Municipality. He has been a Councillor for the last seven and one-half years. He has been a member of the P.A.C. and was Chairman for the past five or six years. He is not presently a member. Mr. Coady supported the proposal.

Both Councillors testified as to their recollection of the events and comments as they occurred at the two Council meetings which considered this rezoning. Portions of their testimony will be examined in more detail later in this decision.

John MacLeod, the Applicant, gave evidence on his own behalf. He reviewed in considerable detail his involvement with the project from the initial application to the current appeal. He indicated that he recently had retained the services of C.A. Campbell Consultants Ltd. to conduct site assessments. He said he will follow their recommendations.

Mr. MacLeod stated when he first approached CBMPC, Mr. Gillis advised him to include in his proposal all possible uses that he would hope to have for the development in the future. This would avoid possible future confusion or misunderstanding with Council. It would also provide Council with a total picture on which to make its decision. Mr. MacLeod expressed a willingness to adjust the development and negotiate changes with various department officials for such matters as road improvements, culvert sizes, brook relocation etc.

At the completion of the hearing the Board visited the site. The Board paid particular attention to areas such as buffering, culverts, flooding, waterfront and land condition.

Section 63 of the **Planning Act** deals with the appeal process when a Municipal Council has amended a Land Use By-law. Subsection 4 gives the Board the powers to deal with zoning by-law amendment appeals. In this case, the Board may either confirm the decision of Council or allow the appeal by reversing the decision of Council.

There is no Municipal Planning Strategy (M.P.S.) adopted for District 11 which includes the subject property. There was a Zoning By-law in effect when the present **Planning Act** was adopted. This By-law has been extended to the current date by Ministerial Order as permitted by Section 112 of the **Planning Act**.

As a result of this, the transitional restrictions of Section 63(6) of the **Planning Act** come into effect. This Section requires that "the Board shall not interfere with the decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality".

When the provisions of Section 63(6) come into play there are few statutory rules or directions to a Municipal Council or to the Board in assessing what is inconsistent with or unnecessary for the protection of the best interests of the Municipality. Consequently, decisions of a Council and the Board, by their very nature, become subjective and open to interpretation even with the guidance of previous Board decisions.

For clarification in determining what may be the best interests of the Municipality, the Board has reviewed the cases cited by counsel in their briefs to the Board as well as other selected Board decisions.

In Lohnes v. Municipality of Kings County, (1976) 6 PPAB 643, a decision of the Provincial Planning Appeal Board, Mr. Rizzetto noted the following from page 648:

> "The protection of the rural resource areas from "urban sprawl" and the defining of growth centres and hamlets which centers can be more efficiently serviced are worthwhile policies".

The circumstances relating to this case are considerably different from the current appeal under review. One significant difference in the Lohnes case is that there was a proposed Municipal Development Plan in existence. For that case the Board stated that it "accepts the policies contained therein (proposed M.D.P.) as being in the best interests of the Municipality" (page 648). In the appeal currently before the Board there is no proposed M.P.S. to consider.

At page 647 of this same decision, the Board notes the following statement with interest:

> "In this appeal the onus is on the Appellants to show that the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality..."

For the current appeal, the Board has adopted the same position.

Reference was made by Mr. Muise to Power v. County of Cape Breton (1986), 5-B M.B.D. 478. At page 488, the following comment is made:

> "The Board might easily draw the inference in an appeal like this one that the decision of Council is, itself,

> a strong indication of what is in the best interests of the Municipality, even when there was no such express finding by Council".

The Board did draw such an inference in the Power case.

As in the Lohnes case the circumstances of the Power appeal are quite different then currently under review. In the Power appeal the Board notes that Council, the public, P.A.C. and planners were all in agreement with the decision of Council. Although this is obviously not the case for this current appeal, there are many reasons stated by the Board in that decision which are applicable to the situations of this appeal.

The drawing of such an inference from Council's decision was also discussed in Lee v. County of Cape Breton (1987), 5-B M.B.D. 209. In this case, such inference was not drawn by the Board. Among the reasons given for not doing so was that Council may have acted on inaccurate information. Consequently Council could not be acting in the best interests of the Municipality.

In Grady et al v. Municipality of the County of Halifax (1989) NSMB-12-89-P (unreported), at page 22, the Board states the following:

> "The Board has heard evidence which Council should have had brought to its attention. The Board must determine whether or not Council's decision is inconsistent with or unnecessary for the protection of the best interests of the municipality. In reaching its decision, the Board may not impose its own decision but must assess Council's decision."

In the current decision before it, the Board has examined all the evidence which was before Council to assist in assessing Council's decision. It also looked at other evidence presented during the hearing to determine if any of it should have been brought to Council's attention or if there were any inaccuracies in Council's information.

The Grady decision referred to Link v. County of Cape Breton (1986) 5-B M.B.D. 667. This case refers to the Board interpreting the best interests of the Municipality to be in the light of planning considerations as obtained from qualified planners. The evidence of Mr. Gillis and Mr. Ryder are discussed later in this appeal.

In the Grady decision, the Board also placed some reliance on a draft M.P.S. which was evolving for the area in question.

Most M.P.S's when adopted by a municipality provide details of matters to be considered by Municipal Council when examining amendments to Land Use By-laws (L.U.B.). These rules, while providing useful direction, are also useful in restricting the Board to considering specific matters when making a determination under an L.U.B. amendment appeal.

The current Zoning By-law in effect for this appeal provides no useful directions or restrictions to assist the Board in making its decision. Consequently the Board must look at other areas for assistance.

Malcolm Gillis gave considerable evidence both in his report and in his direct testimony. When reviewing the details of his report he stated:

> "...that basically zoning is a by-law that is designed as a nuisance by-law to protect developments from other developments that may not necessarily be in compliance with it and in the absence of a Planning Strategy, I guess one would have to assume, at least I did when I gave Council the advice, that should a particular type of development be excluded from the existing zoning, one must naturally assume that it is a type of development that Council considers generally inappropriate for the area. I mean if it was appropriate for the area, I imagine they would have listed it as permitted".

This thought is repeated again and again throughout his testimony with such statements as:

> "...if the Zoning By-law says that these types of uses are not allowed, then I have to assume that it is something that the Municipality considers inappropriate....
>
> ...by the mere fact that it is not listed as permitted in the By-law one has to assume that it is considered inappropriate in that area".

The Board has some concerns in fully adopting this particular attitude of Mr. Gillis. The Board believes that amending provisions to Zoning By-laws were put in place for a reason. Obviously, the drafters of the legislation could not assume that all possible situations could be accounted for in the original legislation. These amending provisions also recognize that needs, desires and attitudes of communities will undoubtedly be changed over time. If a strict interpretation of Mr. Gillis' approach were to be adopted by a Municipality where there is no M.P.S., then one could assume that no rezonings would ever take place within a municipal unit.

Mr. Gillis' attitude towards the proposal is further stated in his testimony when he says:

> "...with a Zoning By-law that is primarily a nuisance By-law, the main concern is that we should be concerned about preserving the existing development".

This reasoning and approach to Planning, as expressed by Mr. Gillis before the Board also appears in the CBMPC report to Council.

Also in this report, Mr. Gillis did include a pro-development side of the argument for Council to consider when he said:

> "...it can be pointed out that this is not a primary resource rich rural area. Generally, there are no large scale, high quality mineral deposits to be mined, the poor soil conditions and rugged topography are not conducive to successful, large scale agricultural developments, and this sector of the Bras D'Or Lakes apparently cannot support a large scale fishery operation. Really, the resource that can most effectively rejuvenate the local rural economy is utilization of the Bras D'Or Lakes and the generally acknowledged beauty of the scenery as a tourist attraction. This proposal clearly fits into that category."

On the negative side of the argument, in addition to the preservation argument discussed above, the report focuses somewhat on the concerns of traffic safety as expressed by the Department of Transportation. It also refers to the comments of the Department of Environment and Departments of Health and Fitness.

The report concluded with the following recommendation:

> "Because this evidently has the potential of being of significant traffic generator and the Department of

> Transportation report does not recommend approval, Staff is compelled to recommend that Council reject this application. Even if the Department of Transportation report was positive, staff would hesitate to recommend approval of the zoning change to permit the campground. The applicant simply has not submitted a comprehensive enough site plan to enable staff to make an accurate assessment of the scale and design of the proposal."

There was some confusion in the testimony as to whether or not the Department of Transportation had changed its recommendation prior to the Council meeting. The Board believes that it did. Council was aware of the fact that a new study was carried out by departmental officials since P.A.C.'s recommendation of May 9, 1989. This study approved sight clearance for the proposed development. Department of Transportation's negative recommendation as contained in the report of the CBMPC considered by P.A.C., was no longer valid by the time of Council decision.

Much of the time and testimony in this appeal centered around the various concerns and requirements as expressed by officials of the Department of Transportation, the Department of Environment and the Department of Health and Fitness. The testimony of the various officials of these departments detailed their concerns and their interpretation of some of the departmental requirements. This testimony, tended to show that Council was not acting in the best interests of the Municipality since Council's decision did not force the developer to address all the concerns and conditions of these officials prior to rezoning.

Deputy Warden Coady countered this argument when he stated in his testimony:

> "...what the Council looks at is the question of is the land suitable for the proposal which is there, where the financing comes from and who the engineer is and how they develop the concept are issues that are dealt with by the Department of Health, the Department of Environment under their permit approval process. It is not an issue that Council deals with at the Council meeting."

Under further questioning he state:

> "...that the Council assumes and knows that the Environment Department is protecting the interests of the Municipality in carrying out its function, that the Department of Health is also protecting our interests as are the Department of Transportation".

There was no direct evidence before Council or the Board to suggest that any regulatory approval would be absolutely refused or that Council was in error to rely on officials of these departments to assist in protecting the interests of the Municipality.

The Board notes that the Municipality could not issue any required building permits without first obtaining approval of the various government officials.

The Board does not believe that Council was acting in a manner inconsistent with or unnecessary for the protection of the best interests of the Municipality by not requiring additional information or approvals of these officials prior to approving the By-law amendment.

The CBMPC recommendation not to approve the By-law amendment concluded by saying there was not enough information for staff to make an accurate assessment. The Board has some sympathy with this concern but must keep in mind the best interest requirement of Section 63(6) of the **Planning Act**.

The Board thinks that it would have been helpful for Council to have inquired into more specifics concerning this proposal. The Board agrees that the proposal was not very comprehensive and therefore very difficult for staff and Provincial officials to make any adequate assessment on the matter.

Mr. Ryder's testimony also suffered from this lack of detail. Because of the vagueness of the proposal his opinion had to be general and subjective in content when it related to the specifics of the development. His consideration of other aspects concerning the project were therefore speculative in nature. He did not carry out any testing himself, he had no personal knowledge of the financial resources of the Applicant and offered no specific facts to substantiate his opinion.

The Board notes that while there was some evidence before Council as to the financial feasibility and other aspects of the project, it was very limited. Certainly, in view of the size of the proposed development, it may have been prudent for Council to have inquired in a little more detail. Mr. MacLeod did state that he believed he had the financial resources available with which to carry out the project. He offered no specifics other than stating that the project would require financing of around one million dollars.

As pointed our by Mr. Rizzetto, Council has now rezoned the subject land to Commercial use without any real assurance that the various regulatory departmental approvals can be obtained or that the Plan is financially viable. Should this proposed development fall through, Council has now zoned a piece of land "commercial" on which future commercial development may occur over which Council would have no control.

All this would tend to support the position that Council may not have been acting in the best interests of the Municipality. However, the Board notes there is no requirement in Section 63(6) for an applicant to provide full and complete details of a proposed project. The Board wonders why Mr. Gillis did not insist on more detail at the initial stage especially in light of the final recommendation of the CBMPC. The Board recognizes that Mr. Gillis was not required to do so either. The Board also believes that Council, had the right to ask for additional information if it felt that it was needed to make their decision. The Councillors felt it was not needed in this case.

The problem being experienced by the parties in this appeal is determining which comes first, a rezoning or the specific details of a proposed development.

In this case the Applicant believed that a rezoning comes first with specific, costly studies to follow. Council has the same approach. The Appellants, obviously, do not. For this case the Board must decide which approach is in the best interest of the Municipality.

The Board was made aware that there are M.P.S.'s in place in other Districts of the Municipality. The M.P.S. in at least one of the Districts would prevent the proposed development for this appeal from taking place.

In the absence of an M.P.S. or even a draft M.P.S. for District 11, the Board cannot assume that the residents of District 11 would adopt the same M.P.S. as other Districts. The **Planning Act** allows an M.P.S. to be adopted for an area only after full due process has been followed. This process has not occurred for District 11. The Board cannot intervene to impose an M.P.S. in this District.

The **Planning Act** does not allow for a development agreement in the absence of an M.P.S. An M.P.S. could offer such relief. This is another example of where such a development agreement would be useful. A development agreement could include solutions to many of the concerns expressed in this appeal. Under a development agreement an automatic rezoning would not occur should the project fail. This is not the case here.

The Board believes that the majority of the concerns of the local residents of Middle Cape should be relieved when the applicant satisfies the regulatory requirements of the officials of Environment, Health and Transportation. The Board has already agreed that Council was not acting in a manner inconsistent with the best interests of the municipality by relying on these permit controls.

Good planning procedures suggest that some form of buffering should exist between properties of an incompatible nature. The Board has noted that there is some natural buffering available on the subject land. There is also a good tree line already existing on the neighbouring land. The Board believes that this natural break would provide an adequate sight and noise buffer for these immediately adjacent properties, should all parties choose to maintain what presently exists.

The Board does agree with the Appellants there could be a problem with policing the use of the waterfront areas. Extensive use of the beach area could have an adverse affect on the neighbouring properties. With the co-operation of all parties solutions to this situation may be found. In any case the Board believes that this adverse affect does not outweigh Council's other considerations.

As suggested in Grady the Board must assess Council's decision. To assist in determining if Council's decision was inconsistent with or unnecessary for the protection of the best interests of the Municipality, the Board has reviewed the information Council considered in making its decision to insure that it was an informed decision based on adequate information.

The Minutes of the Council meeting of June 20th are not very helpful. They list the people who spoke at the public hearing and state "discussion took place by members of Council". In the absence of any further detail in the Minutes, the Board has reviewed the testimony of Deputy Warden Coady and Councillor Doncaster. The Board recognizes that these Councillors cannot speak for the whole of Council nor comment on what others were thinking.

In response to a direct question whether or not Council gave proper consideration to the comments that were expressed by the Metro Planning Commission, Deputy Warden Coady responded:

> "...I think so. It is not, it is not often that we go against the recommendations of Metro Planning, but we have done so in the past and we probably will do so in the future. Council tends to look at their comments as one input in the process but not the only one and certainly not (in terms of their recommendation). Obviously when they made up their minds the Councillors saw the issue from a little bit different perspective than the individual doing the report."

Earlier in his testimony he stated:

> "...certain Councillors indicated they would vote in favour of the proposal because they saw it as an economic benefit to the Municipality and to residents of the Municipality who would be employed at the site and others I believe if I recall correctly mentioned the fact that we are a rural community and that campgrounds are not inconsistent with the rural nature of Cape Breton County."

Later in his testimony in response to cross-examination and the question "What does it do (County Council), does it try to satisfy the people in the area or does it try to satisfy the entire County". Councillor Coady said the following:

> "I don't think I am going to go on a situation of either/or here. I think the Municipality looks at all kinds of factors and I thought I made that clear already. There are many factors which go into the Council making a decision. One of the factors is the best interests of the Municipality. Another of the factors is the wishes and desire of the people in the area. Another one which you have already mentioned is

> economic development which is a reality in our municipality. And another one is the experience of the individual Councillors...".

When cross-examining Councillor Doncaster, Mr. Muise made the following comment to which the Councillor agreed:

> "...that you feel the reason the motion was carried was they (Council) felt that a person owning a piece of land should not be overly restricted from developing it. That we should encourage some kind of commercial development and employment, something to create employment, were they the reasons you felt that the vote carried."

In re-direct Mr. Rizzetto made the following statement to which Councillor Doncaster also agreed:

> "...the aspects of good planning principals and the aspect of rezoning along the lines of good planning for the community was never really ever considered by Council".

Councillor Doncaster's recollection of the vote was that not counting the Warden's vote it was 17 to 2 in favour of the rezoning. No other evidence was presented as to the vote count.

Testimony of other witnesses supports the view that employment and commercial development were the only matters verbally discussed by Councillors at the meeting.

The Board must also look at the evidence before it. It does this to determine if there were any inaccuracies in the information before Council. Also to see if there was any new information, of a material nature, which was not available to Council when making its decision. Such information would suggest that Council was not acting in the best interest of the Municipality.

The direct testimony of the witnesses from the various provincial departments was obviously not before Council. The reliance on Council on various officials of government regulatory departments to act in the best interests of the municipality has already been discussed by the Board in this decision.

The Board was impressed with the knowledge of these witnesses and their understanding of the requirements of and their responsibilities to this proposed development.

The Board was given current information from the Department of Transportation but as already stated the Department of Transportation had already given clearance approval prior to Council's decision.

The Minutes of the P.A.C. were before Council.

The Report of the CBMPC was before Council. The Board did have the advantage of the direct testimony of Malcolm Gillis which has previously been discussed at some length. Mr. Gillis did appear before the P.A.C.

Mr. Ryder did not appear before Council. His testimony to the Board did not add any matters of a material nature to the Board's understanding of the case. It also did not identify any inaccuracies in the information before the Board or Council.

Mr. Rizzetto appeared before the P.A.C. and both Council meetings as did many of the same residents who appeared before the Board.

Councillor Doncaster and Councillor Coady have both served on the P.A.C. The Minutes of the P.A.C. show there are at least five other Councillors who currently serve on the P.A.C.

Contrary to the situation in Grady the Board does not believe that it has heard any evidence which should have been brought to the attention of Council.

It is the Board's opinion that adequate and accurate information was before Council upon which to determine what it considered the best interests of the municipality. Council chose not to request additional facts. In doing so Council accepted as adequate the financial feasibility information before it. The Board will not disagree with this position in this case. The fact that only development and employment were openly discussed and that any other planning matters or concerns were not does not mean that they were not considered by the individual Councillors. Whether Councillors chose to read the information, listen to the verbal presentations or use their own knowledge cannot be determined by the Board. Sufficient information was before the Councillors should they have chosen to use it.

The Board has further reviewed the evidence to determine what other matters may be considered to be in the best interests of the Municipality. Job creation and commercial development were obviously considered by Council to be prime factors in assessing the best interests of the Municipality.

The Appellants believe that the best interests of the

Municipality would be served by the preservation of the continued right to the quiet enjoyment of their property. Mr. Gillis supports this with his recommendation to keep the area low-density residential use.

There does not appear to be any other specific points raised during the appeal which relate to what would be considered in the best interests of the Municipality.

What may not be in the best interests of the Municipality is that Council has now rezoned a piece of land without full assurance that the proposed project can take place.

Under the circumstances of this case, the Board will draw the same inference as it did in the Power appeal which was:

> "The Board might easily draw the inference in an appeal like this one that the decision of Council is, itself, a strong indication of what is in the best interests of the Municipality, even when there was no such express finding by Council".

The Board does so for the following reasons:

1. The Board believes, from the evidence before it, that the decision of Council was an informed one based on adequate information;

2. There is no evidence before the Board to show that Council may have acted on any inaccurate information;

3. From the Minutes of the P.A.C. meetings, the report of the CBMPC and the testimony during the public hearing, Council was aware that others felt that additional information would be helpful in assessing the proposal. Council obviously made a conscious

decision to ignore this advice and proceed without it. In the Board's opinion there was no evidence presented to it which would show that this approach of Council was in error.

4. Council relied on the permit controls of various government regulatory officials to act in the best interests of the Municipality when issuing permits for this proposed development. As already stated, in the circumstances of this appeal, the Board does not believe this to have been an inappropriate action.

5. Evidence is shown that Council was aware of the fact that should the proposed development fail, a rezoning would have taken place over which there would be no future development control. In deciding in the manner it did council determined that the best interest of the Municipality were better served by other considerations.

6. As one of the stated reasons for a negative recommendation by both the CBMPC and the P.A.C. was the negative report of the Department of Transportation. This received some priority in the CBMPC recommendation. It also had prominence at the P.A.C. as it was recorded in the Minutes at least three times on April 11, 1989, and on May 9th four times. By the time Council considered the by-law amendment on June 20, 1989, the Department of Transportation had given

its approval. There was no longer a reason for rejecting the amendment on the basis of transportation refusal.

7. The Board agrees that the proposed development may not necessarily be in the best interests of the residents of the immediately adjacent properties located in Middle Cape. However, the Board does not believe that it necessarily follows that because of this the proposal would not be in the best interests of the Municipality as a whole. The Board does not believe that the consideration of "best interests" must necessarily be confined solely to one small segment of the total Municipality.

8. The economic conditions of the Municipality are well known to the Councillors and a high priority is placed on employment and economic development for any area of the Municipality. The Board is reluctant to interfere with the priority in the absence of firm evidence to the contrary.

In making its decision Council has accepted the pro-development argument of Mr. Gillis in the CBMPC report over his argument to keep the area to low density residential use.

In addition to the foregoing the Board has placed some reliance on the fact that Council considered the matter on two separate occasions. The Board recognizes that the first meeting has no legal status. A public hearing was held both times. In spite of all the strong opposition expressed, approval was given on both occasions. In fact, at both meetings, Council first had to consciously reject a motion of refusal to amend prior to giving approval. This in effect is four motions in favour of the proposal by Council. It was not a close vote. There was very little opposition by Councillors.

Based on the evidence before it, the Board determines that the Appellants have not met the burden of showing that Council's decision to rezone was not in the best interest of the municipality.

Under the provisions of Section 63(6) of the **Planning Act** the Board will not interfere with the decision of the Council. The Board is of the opinion that such decision was not "inconsistent with or unnecessary for the protection of the best interests of the Municipality". Therefore the Board confirms the decision of Council.

The Appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of December, A.D., 1989.

MICHAEL E. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: APPLICATION BY MARKBOROUGH PROPERTIES LTD. and BURNAC LEASEHOLDS

SHOPPING CENTRES - EXPANSION OF EXISTING MALL - SHOPPING CENTRE DEVELOPMENT ACT, s. 6.

This is an application to expand the Mayflower Mall in Cape Breton County. The expansion will create a food court, extra common areas, retail stores and a free standing grocery store. The only opposition at the Board hearing was from the Mayor and 2 Councillors from the Town of Glace Bay. Studies done on behalf of the applicant showed the mall attracts a different clientele than other shopping centres.

HELD; Application approved.

Both the study and survey conclude that the expansion of the Mayflower Mall will not impact adversely on the other shopping centres. The only contradiction is the proposed grocery store which will draw its customers from existing grocery stores.

NSMB-2-88-SCD

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application under the Shopping Centre Development Act, S.N.S. 1978-79, c. 74, as amended, by **MARKBOROUGH PROPERTIES LIMITED** and **BURNAC LEASEHOLDS**, a division of Burnac Corporation, to expand the Mayflower Mall in Cape Breton County.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROBERT GRANT, LL.B., and JONATHAN STOBIE, LL.B., for the Applicants.

HEARING DATE: March 28, 1989.

DECISION DATE: April 24, 1989.

DECISION: **Application Approved.**

DECISION

The Shopping Centre Development Act applies (with some exceptions) to proposed shopping centres of 50,000 square feet or more and to expansions of 10,000 square feet or more. Under the Act, no person may develop or expand a shopping centre without approval. Where there is a Municipal Planning Strategy ("M.P.S.") in effect, the application is to the Council of the relevant Municipality. If there is no M.P.S. in effect, the application is to the Board.

Markborough Properties Ltd. and Burnac Leaseholds are the owners of the Mayflower Mall in Cape Breton County. They are proposing a 87,353 square foot expansion, including a 55,000 square foot free standing grocery store. The expansion will create a food court and extra common areas as well as retail stores. There is no M.P.S. in effect. The owners applied to the Board for approval.

The Shopping Centre Development Act requires the Board to give Notice of Hearing to the Clerk of every municipality within 50 miles of the shopping centre. The Board gave the required notice, however no municipality asked to formally intervene in the hearing. The mayor of Glace Bay, Donald MacInnes, and Councillors Ron Burrows and Peter MacPhee, testified in opposition to the proposed expansion. Joseph MacKinnon, Warden of the Municipality of the County of Cape Breton, testified in support.

The Board held an evening hearing for members of the public to make presentations. Five individuals spoke in favour of the expansion. In addition, the Applicants introduced letters of support from various individuals.

Section 6 of the Shopping Centre Development Act states as follows:

> "In determining whether to approve or not to approve a shopping centre, the Board shall consider
>
> a) the need for or desirability of additional retail space in the area in which the shopping centre is proposed to be constructed or enlarged;
>
> b) the effect of the additional retail space on existing or proposed retail outlets in the general area to be served by the shopping centre;

c) such considerations as the Governor in Council may prescribe."

The Governor in Council has not prescribed any considerations.

Section 4 of the Shopping Centre Act requires an Applicant to conduct surveys and studies to assist the Board in evaluating the application.

The Applicants hired Marketscope of Toronto to do a market analysis. This analysis focused on consumer spending on Department Store Type Merchandise ("DSTM") in Cape Breton. The study predicts a positive growth in retail sales in the Sydney area ranging from a high of 50% for the Mayflower Mall to a low of 17% for the Cape Breton Plaza between 1988 and 1996.

The study concludes that the effect of the proposed expansion on other shopping areas is minimal because only 27,000 square feet of the expansion is for DSTM stores. This represents 6.5% of the existing DSTM square footage in the primary trade area. When questioned, Christine Lloyd, owner of Marketscope, admitted that the addition of a foodstore may result in a greater negative impact on the retail outlets located outside the Mayflower Mall.

Corporate Research Associates Inc. of Halifax conducted a telephone survey of approximately 400 consumers in the Sydney area including Sydney, Glace Bay, New Waterford, Sydney Mines, North Sydney and the surrounding County. The survey's emphasis was on DSTM but there were questions respecting grocery store shopping.

The survey found there are differences in the age, education and income level of persons who shop at the Mayflower Mall as compared to those who shop elsewhere in the area. The study also found that the lack of a grocery store and a food court at the Mayflower Mall was a common complaint.

The absence of a formal intervenor in the proceedings resulted in little cross-examination of the expert witnesses. On occasion Reeves Matheson, solicitor for the Town of Glace Bay, requested and was permitted to question the witnesses. Mayor MacInnes in his presentation pointed out some possible flaws in the evidence.

Mayor MacInnes' major concern was the past dealings of Burnac Corporation with the Town of Glace Bay. The Board allowed this evidence, despite objections from the Applicants, on the basis that it might relate to the effect of the expansion on other proposed retail outlets in the area. The gist of the Mayor's concern is a proposed mall on Reserve Street in Glace Bay that has never been built. Burnac was the successful bidder on Town owned land. Burnac entered into an agreement to build the mall at around the same time as the Mayflower Mall was built. Burnac paid a much higher price for the Glace Bay land than Council had anticipated. At least one Councillor suspected Burnac was attempting to prevent a competitor from establishing a mall on the site. The Town of Glace Bay has initiated legal proceedings to recover a $50,000.00 performance bond from Burnac. It is clear the Mayor hopes his opposition to the Mayflower Mall expansion will assist the Town in recovering the money.

The Board is satisfied that it is not the future expansion of the Mayflower Mall which is preventing the development of a mall on Reserve Street in Glace Bay.

Mayor MacInnes referred the Board to a decision of the Provincial Planning Appeal Board concerning an appeal by Burnac Leaseholds Ltd., dated August 23, 1979. Burnac had appealed the County's decision to rezone 45 acres of land adjacent to the Mayflower Mall, to permit a proposed shopping centre by the Chernin Group. The Provincial Planning Appeal Board considered the evidence of various experts. It determined that the rezoning created:

> "...an excess of commercially zoned lands... and this excess capacity if utilized at this time, could certainly have an adverse effect on the existing commercially zoned lands..."

The Board permitted only a small portion of the lands to be rezoned.

At the time of the decision, the Shopping Centre Development Act was not in effect. The Provincial Planning Appeal Board was acting under the **Planning Act**. Different considerations apply.

Mayor MacInnes particularly wanted to draw the Board's attention to the evidence of the various experts. Since those experts were not testifying before this Board, the Board cannot consider their evidence. In addition the evidence is 10 years old and is probably outdated.

The Board notes that none of the Mayflower Mall's competitors testified at the hearing in opposition to the expansion. While the Corporate Research Associates' survey indicates that the Mayflower Mall attracts a different clientele, the addition of a grocery store will in all probability have an impact on other grocery stores in the area. The Dominion Store did a good business in the mall. When it closed, the other grocery stores must have gained. It is anticipated the new grocery store will likely attract some of Dominion's former customers.

The evidence indicates there is a desire for a grocery store in the Mayflower Mall. While most of the area vacated by the Dominion Store is still available, the present trend, according to Mr. Donald Logey, Vice-President of Development for Markborough, is for free-standing grocery stores. In addition, potential grocery store tenants want more space than the 42,000 square feet which the Dominion Store occupied.

There is evidence some customers need and desire a food court in the mall. The proposed expansion permits this.

The additional space will permit a second walkway from one end of the mall to the other and a new entrance. The Shoppers Drug Mart can move from the rear of the mall to the front and operate extra hours.

Both the study and survey conducted for the Applicants conclude that the expansion of the Mayflower Mall will not impact adversely on the other shopping centres. The only contradiction to this is that the proposed grocery store will draw its customers from existing grocery stores. There was no evidence from any existing retail outlets that the proposed expansion will adversely impact on their business.

The Board is satisfied that all the requirements of the **Shopping Centre Development Act** have been met.

The Board approves the expansion of the Mayflower Mall.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of April, A.D., 1989.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: COUNTY OF PICTOU and TOWN OF TRENTON

MUTUAL BOUNDARY - SETTLEMENT BY AGREEMENT - MUNICIPAL BOUNDARIES AND REPRESENTATION ACT - S. 25.

Section 25 of the Municipal Boundaries and Representation Act permits the Board to confirm the settlement of the mutual boundary between two or more municipalities where they agree and no objections have been filed with the Board.

The County of Pictou and the Town of Trenton agreed on a settlement of this mutual boundary. The Board by order confirmed the settlement.

NSMB-2-89-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application under the Municipal Boundaries and Representation Act by the **MUNICIPALITY OF THE COUNTY OF PICTOU** and the **TOWN OF TRENTON** to settle their mutual boundary.

BEFORE: MICHAEL G. JOHNSON, Chairman.

ORDER

WHEREAS the Municipality of the County of Pictou and the Municipality of the Town of Trenton have agreed to a settlement of their mutual boundary;

AND WHEREAS Notice of this settlement has been advertised in The Evening News, a newspaper circulating in both municipalities on September 30, 1989, October 7, 1989 and October 14, 1989;

AND FURTHER WHEREAS there have been no objections to this settlement filed with the Board;

IT IS HEREBY ORDERED pursuant to Section 25 of the **Municipal Boundaries and Representation Act** that the Board confirm the settlement of the mutual boundary between the County of Pictou and the Town of Trenton as agreed to by the Municipality and described in Schedule "A" attached hereto and forming part of this Order.

DATED at HALIFAX, Nova Scotia, this 16th day of November, A.D., 1989.

Doreen Friis

DOREEN FRIIS
Clerk

DESCRIPTION OF BOUNDARY BETWEEN
THE MUNICIPALITY OF THE COUNTY OF PICTOU AND
THE TOWN OF TRENTON

All bearings refer to the Nova Scotia GRID System (Values 1975); the magnetic declination for 1985 is approximately 22 degrees 30 minutes WEST;

BEGINNING at an old stone monument marked "N.G." having coordinates N 16,572.962.27 E 712,062.27; said stone monument being the North East corner of the Town of New Glasgow; said stone monument being the South East corner of the Town of Trenton; said stone monument being also on the western boundary of the Municipality of Pictou County; said stone monument has also the chainage 0 + 00 N;

THENCE North 8 degrees 41 minutes 44 seconds East passing through lands owned by J. Clarence Trites, across a transmission line, across Canadian National Railways to a nail set in centre of pavement of Little Harbour Road N 16,574,100.038 E 712,236.282 (CHAINAGE 11 + 51.0 N);

THENCE North 8 degrees 41 minutes 44 seconds East across a Transmission line to a survey marker N 16,575,689.754 E 712,479.417 (CHAINAGE 27 + 59.2 N):

THENCE South 62 degrees 25 minutes 15 seconds East along the Airport land a distance of Nine hundred and eighty-one decimal 16 feet (981.16') to a survey marker N 16,575,235.504 E 713,349.088;

THENCE North 5 degrees 54 minutes 53 seconds East along the eastern boundary of the Airport land a distance of Nine hundred and three decimal 38 feet (903.38') to a survey marker N 16,576,134.077 E 713,442.180;

THENCE North 60 degrees 05 minutes West Eighty-five feet (85.0') to a survey marker;

THENCE North 29 degrees 13 minutes 42 seconds East along the eastern boundary of the Airport land a distance of Eight hundred and ninety-nine decimal 03 feet (899.03') to a survey marker N 16,576,961.036 E 713,807.495;

THENCE South 82 degrees 59 minutes 35 seconds East across the NARROWS ROAD along the Airport land a distance of One thousand seven hundred and fifty-two decimal 77 feet (1752.77') to a survey marker N 16,576,747.214 E 715,547.170;

THENCE North 4 degrees 43 minutes 09 seconds East along the eastern boundary of the Airport land a distance of One thousand three hundred and forty-nine decimal 92 feet (1349.92') to a survey marker N 16,578.092.557 E 715,658.232;

THENCE North 56 degrees 56 minutes 23 seconds West along the north eastern boundary of the Airport land a distance of Seven hundred and ninety-four decimal 51 feet (794.51') to a survey marker found N 16,578,525.980 E 714,992.358;

THENCE North 13 degrees 01 minute 19 seconds East along the southern boundary of land formerly owned by JOHN A WILSON a distance of Eight hundred and thirty-one decimal 60 feet (831.60') to a survey marker found N 16,579,336.194 E 715,179.739 at the southern side line of Park Road;

THENCE South 56 degrees 05 minutes 02 seconds East a distance of One thousand five hundred and fifty-three decimal 43 feet (1553.43') to a survey marker planted N 16,578,469.413 E 716,468.862;

THENCE North 8 degrees 28 minutes 48 seconds East along the eastern boundary of the Steeltown Park across Park Road (Logan Road) a distance of Eight hundred and fifty-one decimal 42 feet (851.42') to a survey marker found N 16,579,311.524 E 716,594.415;

THENCE North 8 degrees 28 minutes 53 seconds East along the eastern boundary of the Steeltown Park a distance of Nine hundred and ninety decimal 02 feet (990.02') to a survey marker found N 16,580,290.716 E 716,740.431;

THENCE North 8 degrees 28 minutes 41 seconds East along the eastern boundary of said Steeltown Park a distance of Eight hundred and twenty-five feet (825.0') to a survey marker found N 16,581,106.701 E 716,862.061;

THENCE North 61 degrees 23 minutes 02 seconds West along the northern boundary of said Steeltown Park a distance of Seven hundred and seventy-three decimal 08 feet (773.08') to an iron pipe found N 16,581,476.959 E 716,183.414;

THENCE North 62 degrees 23 minutes 51 seconds West along the northern boundary of said Steeltown Park a distance of One thousand eight hundred and eighteen decimal 85 feet (1818.85') to an iron pipe found N 16,582,319.695 E 714,571.579;

THENCE North 11 degrees 38 minutes 37 seconds East across a Transmission line (two double pole lines) a distance of Two hundred and ten decimal 74 feet (210.74') to a survey marker N 16,582,526.009 E 714,614.112;

THENCE North 85 degrees 39 minutes 59 seconds West along the northern boundary of said Steeltown Park a distance of Three thousand seven hundred and fifty-nine decimal 33 feet (3759.33') to a survey marker N 16,582,810.172 E 710,865.527;

THENCE North 82 degrees 37 minutes 59 seconds West along the northern boundary of the Steeltown Park land and the northern boundary of a lot owned and occupied by John Druham (Book 629 p. 13) a distance of Five hundred and thirty feet (530.0') to a survey marker N 16,582,878.131 E 710,339,902 at the eastern side line of Little Egypt Road;

THENCE South 19 degrees 28 minutes West along the eastern margin of Little Egypt Road a distance of Ninety-five decimal 43 feet (95.43') to a point, called Station 1;

THENCE along the arc of the south eastern margin of said Road a distance of One hundred and sixty-eight decimal 14 feet (168.14') (CHORD = S 42^{0}25'W 163.67') to Station 2;

THENCE South 65 degrees 22 minutes West along said road Thirty-four decimal 2 feet (34.2') to Station 3;

THENCE along the arc of said Road Ninety-five decimal 52 feet (95.52') (CHORD = S 79^{0}55'W 94.51') to Station 4;

THENCE North 85 degrees 32 minutes West along the southern margin of said road a distance of Two hundred and thirty-five feet (235.0') to Station 5;

THENCE along the arc of said Road Seventy-eight decimal 55 feet (78.55') (CHORD = N 88^{0}42'59"W 78.5') to Station 6;

THENCE South 88 degrees 06 minutes West along the southern margin of said road a distance of Three hundred and thirty-three decimal 1 feet (333.1') to Station 7;

THENCE along the arc of said Road a distance of One hundred and fifty decimal 65 feet (150.65') (CHORD = S 80^{0}19'W 150.18') to Station 8;

THENCE South 72 degrees 32 minutes West along the southern margin of said Road a distance of Twenty-three decimal 2 feet (23.2') to Station 9;

THENCE along the arc a distance of Two hundred and twenty decimal 36 feet (220.36') (CHORD = S 78^{0}21'01"W 219.98') to a survey marker N 16,582,568.234 E 709,042.026;

THENCE South 84 degrees 10 minutes West along said Little Egypt Road a distance of One Hundred and forty-one decimal 0 feet

(141.0') to a point, called Station 10 at Pictou Landing Road;

THENCE South 10 degrees 16 minutes 14 seconds East along Pictou Landing Road a distance of One hundred and ninety-six decimal 03 feet (196.03') to a point, called Station 11 at Lowden Brook;

THENCE South 88 degrees 07 minutes West along said brook a distance of Thirty-three decimal 35 feet (33.35') to a point, called Station 12, N 16,582,359.915 E 708,903.373 at the centre of Pictou Landing Road;

THENCE South 88 degrees 07 minutes West along Lowden Brook a distance of One hundred and fifty feet (150') to a point, called Station 13;

THENCE North 69 degrees 23 minutes West along Lowden Brook a distance of Two hundred and forty-five feet (245') to a point, called Station 14 N 16,582,441.252 E 708,524.144;

The Boundary of the County of Pictou follows the north eastern shore of the East River of Pictou.

SAID described boundary line being shown on the following survey plans prepared by O.P. ROSINSKI, Nova Scotia Land Surveyor: 1452-S-84, 1452-T-84, 1452-U-84, 1452-V-85, 1452-W-85, 1452-X-85 and 1452-Y-85.

The survey was based on the "Notice of Polling on incorporation for the Town of Trenton" October 17, 1910; also see "The Royal Gazette" on March 22, 1911; also see Statutes of Nova Scotia 1964 Chapter 89 Alteration of Town (Trenton) boundaries.